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HARVARD LAW LIBRARY

Received JUN 2 : 1915

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

JANUARY TERM, 1914.

BY
W. W. CORNWALL
REPORTER

VOLUME XLVII.

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BYRON W. PRESTON, Mahaska County.

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**REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, JANUARY, 1914, TERM
AND IN THE SIXTY-EIGHTH YEAR OF THE STATE.**

**ARTHUR SHADDEN and JOSEPHINE SHADDEN, Appellees, v.
D. E. BUTLER and H. S. TERRY, Appellants.**

Abuse of process: EVIDENCE. In an action for abuse of process in the
1 levy of an attachment the defendant may show that he had good
grounds for proceeding in that manner, that he endeavored to set-
tle the claim with plaintiff after the levy, and what plaintiff had
stated when he made a bill of sale of the property levied upon, as
bearing on the questions of probable cause and of malice. De-
fendant should also have been permitted to show in this case
that plaintiff made a bill of sale to the property levied upon,
signed by himself alone, in resistance to his claim that the prop-
erty was exempt.

Same: PROBABLE CAUSE: EVIDENCE. In actions for abuse of process
2 the plaintiff must prove want of probable cause; and this cannot
be shown by proof of malice alone, although malice may be in-
VOL. 164 IA.—1

ferred from want of probable cause. The instructions in this case were erroneous in failing to require proof of probable cause.

Same: MALICE: INSTRUCTIONS. Instructions submitting the question 3 of malice, in an action for abuse of process, bearing simply on the question of exemplary damages and not on the question of plaintiff's right of recovery, were erroneous.

Appeal from Pottawattamie District Court.—HON. E. B. WOODRUFF, Judge.

SATURDAY, DECEMBER 13, 1913.

ACTION at law to recover damages for abuse of process. Trial to a jury; verdict and judgment for plaintiff, against both defendants, but in separate amounts, and defendants appeal.—*Reversed.*

John P. Organ, for appellants.

H. L. Robertson, for appellees.

DEEMER, J.—Defendant Butler sued out a writ of attachment from justice's court against the plaintiffs to satisfy a debt for the sum of \$64.51. The writ was delivered to defendant Terry, who was a constable, for service, and he proceeded thereunder to levy upon a horse, as the property of the defendants, in the suit, or one of them. The grounds for the attachment were that defendants were about to remove the property out of the state without leaving sufficient for the payment of their debts; that they had disposed of their property with intent to defraud their creditors; that they were about to remove permanently out of the state, and refused to pay Butler, the plaintiff in suit. Bond was given for the attachment as by law provided. Shortly after the levy, Arthur Shadden served notice upon the constable demanding the release of the horse, because it was exempt; and at the trial of the case before the justice he moved for the release of the

property attached because it was exempt; but the justice denied the motion and held the property not exempt. An appeal was taken by Shadden. A few days before the commencement of the attachment suit, Arthur Shadden alone made a bill of sale of the animal in controversy to one Foote; and some time after the case was tried, before the justice, Shadden's wife signed the bill of sale, and on the same day Foote served notice on Butler and the constable to release the property. Butler either gave bond to or deposited cash with the constable to protect him, and the horse was sold upon execution for the sum of \$120. Before acquiring the animal in controversy, Shadden owned two horses which he had used in his business of teaming and farming. At the time of the levy, he made no claim that the mare levied upon was exempt. On the contrary, he turned her over to the constable with the remark that he did not have a "dollar in the mare." Both Butler and the constable tried to have Shadden settle the claim before suit, but Shadden refused to do so and after the levy Butler renewed his efforts but without success. Plaintiff commenced this action in January of the year 1912. The original petition contained two counts, one being in the form of an action on the attachment bond given by Butler, to which the constable was made a party, and the other an action against the two defendants for malicious abuse of process. The defendants filed separate answers, which were, in effect, general denials. Before the trial commenced, defendants filed a motion to require plaintiffs to elect upon which count they would proceed, and, pursuant to the motion, the following order was made and election entered of record: "The motion to require plaintiff to elect as to which of the defendants he will proceed against is at this time fully submitted, and the court requires plaintiff to elect as to which cause of action set out in the petition he will proceed upon. And the plaintiff in open court elects to proceed upon the cause of action for abuse of process set out in the petition." The case then went to trial upon the issues stated after the election was made,

resulting in a verdict for plaintiffs against both defendants, the amount awarded as against Butler being \$325, made up of \$175 actual and \$150 exemplary damages and against Terry \$75, all exemplary damages. Defendants each filed a motion for a new trial, and Butler's motion was overruled, but Terry's was sustained. Butler alone appeals.

I. Defendant Butler sought to show that he had good grounds for suing out the writ of attachment; that he not only tried to settle his account with Shadden after the levy;

but that he had others make the attempt, all without success. He also offered to show what plaintiff Shadden said to the justice when he

1. ABUSE OF
PROCESS : evi-
dence.

made the bill of sale of the animal to Foote. Much, if not all, of this testimony should have been received. In an action for abuse of process, it must be shown not only that the process was unwarrantable, that is, that it was issued and levied unlawfully, or without probable cause, but that it was also malicious, and any facts which tend to rebut either of these propositions are admissible in evidence. If then defendant Butler had reasonable grounds to believe that the mare was subject to attachment either because Shadden was about to leave the state, so as to deprive him of the right to claim his exemptions, or that he (Shadden) had selected other property as exempt by making a bill of sale of one of three animals, any one or two of which he might have claimed as exempt; these facts or either of them would bear not only on the question of probable cause, but also on the question of malice, and it seems to us that such testimony should have been received. The testimony given over defendant's objections that Butler deposited with the constable cash in lieu of a bond to protect the constable because of the levy is very doubtful in our minds, although if properly limited it might perhaps be admissible, as showing that Butler, after being advised of plaintiff's claim of exemption, nevertheless proceeded with the levy.

As against this, however, defendant should have been

permitted to show that plaintiff made a bill of sale, whether absolute or as security, signed by himself alone, tending to show that he did not regard the animal as exempt; for, if exempt, his wife must have joined with him in the bill of sale in order for it to become effective.

In a case heretofore decided by this court, it was held by the majority that the making a bill of sale by the husband alone on one horse or one team, when he had three, was an election by the husband not to claim the one sold (or mortgaged) as exempt. See *Grover v. Younie*, 110 Iowa, 446.

II. Notwithstanding the election of plaintiffs to hold the defendants on the theory of abuse of process, the trial court gave the following, among other instructions:

(6) The plaintiffs must also show by the greater weight of the evidence that he was a teamster or farmer and habitually earned his living and that of his family by the use of a team of horses, and, if he has shown such fact, then he is entitled to claim exempt from levy the team with which he did habitually earn such living, and the plaintiff, under the law, was entitled to make his own selection of such team if at the time of the levy he owned more than two horses. The defendants were not authorized by law to make such selection for him. He alone had that right at any time before sale.

(10) As far as the defendant Butler is concerned, if he directed the constable to levy on the mare in question, and you find that said mare at the time was exempt from levy, and that when plaintiff claimed his exemption of said mare, if he did so claim it, he refused to have the levy released, but caused the said mare to be sold by the constable, then he would be liable for the value of the said mare in this action.

(11½) In regard to the alleged malice of the defendant Butler, if you find from the evidence that he directed the constable to levy and sell the mare in question through a spirit of feeling of ill will towards the plaintiffs or either of them, or through a desire to injure, harass, or annoy them or either of them, or to take and sell the mare in question contrary to law, such acts, if shown, would be sufficient to justify you in finding that he acted with malice. It is not necessary to act maliciously that the said defendant Butler must have been 'mad' at the

plaintiffs or either of them, as that word is generally understood. On the other hand, if you find from the evidence that the defendant Butler was simply attempting to collect a debt against the plaintiff, and that he caused a levy and sale of the mare in question in the belief and with the understanding on his part that said mare was not exempt from execution, and therefore he had a right to levy and sell her, and in doing so he was not actuated by any hostile motives or desire or purpose to injure the plaintiffs or either of them, then it cannot rightfully be said that he acted maliciously, even though you may find, under the evidence shown in this case, guided by the instructions of the court, that said mare was in fact exempt from execution and sale. The mere fact that a levy and sale of exempt property was made is not sufficient alone to show malice.

(12) The burden is upon the plaintiff to show that the defendants or either of them acted maliciously, and, if the plaintiff has failed to show such fact, then plaintiff can recover nothing for exemplary damages, even though it appears that the mare in question was exempt from execution.

(15) If the plaintiff has failed to show that he was a married man and the head of a family and entitled to claim an exempt team, and that he owned the mare in question, and that she was exempt, then he cannot recover in this action. But if he has shown all of such matters, then he is entitled to a recovery as against both defendants for the fair and reasonable market value of said mare at the time of the levy with 6 per cent. interest to this date.

(16) If you find that plaintiffs are entitled to recover for the value of said mare, then you may also allow the plaintiffs exemplary damages, if you find that the defendants acted maliciously as heretofore explained. Exemplary damages are allowed to punish the one committing a wrongful act, but in no case can they be allowed unless actual damages are first shown. You are not required to allow exemplary damages, but you may do so if you find the evidence justifies it as before explained; that is, if you find defendants or either of them acted without malice, and the amount which you may allow rests in your sound judgment and discretion, and the amount which you may find for either actual damages or exemplary damages cannot exceed the amount therefor as claimed in the petition, and if you find that either one of the defendants did not act with malice, then as to such de-

fendant or defendants you should allow nothing for exemplary damages.

The rule for this state, as to the malicious abuse of process, is as follows:

The authorities are strong, if not uniform, that the unlawful use of the process must be malicious, and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution. In fact, the two actions are of the same general character, the one being the malicious prosecution of a suit and the other the malicious use of process issued in aid of a proceeding, either pending or determined. Keeping in view that such an action is warranted when the process of the court is maliciously and without probable cause misused or misapplied to accomplish some purpose not warranted or commanded by the writ, we are in position to apply the rule to the facts in this case. The property in question is by law exempt from execution, which means that it is not to be seized upon execution for the debts of the owner. Code, section 3072. Hence such a levy is not warranted under the law. The execution, if against the property of the judgment debtor, requires the sheriff 'to satisfy the judgment and interest out of property of the debtor subject to execution.' Code, section 3033. It is thus seen that nothing in the law nor in the face of the process warrants the seizure of exempt property. But where it is done, more than the unwarrantable act is required. It must be done maliciously, and without probable cause. (*Nix v. Goodhill*, 95 Iowa, 285.)

By the instructions given the question of probable cause was eliminated, and it is well settled by all the authorities, we think, both in actions of malicious prosecution and for the malicious abuse of process, that absence of
2. SAME: probable cause: evidence. probable cause must be shown. Such a finding cannot be made from proof of malice alone, although malice may be inferred from proof of want of probable cause. The trial court evidently overlooked the fact that want of probable cause must be shown and submitted the question as to whether or not the property was in fact exempt in the

hands of Shadden. In ruling on the admission of testimony, this was evidently the predominant thought in the mind of the court; for the testimony was all directed to the question of exemption in fact.

Moreover, in the fifteenth and sixteenth instruction, before quoted, it is apparent that the court submitted the question of malice, not as bearing on plaintiff's right to recover, but on the amount of his recovery; that is, as bearing upon the question of exemplary damages. In answer to special interrogatories, the jury found that both defendants acted maliciously and an award of exemplary damages was made accordingly. Indeed, exemplary damages were awarded against Terry, although no actual damages were found as to him. The verdict was set aside as to Terry, and, of course, he has no cause for complaint now.

Other questions are presented which do not demand attention. For the errors pointed out, the judgment must be, and it is, *Reversed*.

WEAVER, C. J., and GAYNOR and WITHROW, JJ., concur.

ALLIS-CHALMERS COMPANY, Appellee, v. CITY OF ATLANTIC,
CASS COUNTY, Appellant.

Fixtures: MACHINERY. Where machinery is sold with the understanding that it will be attached to and become a part of the realty so that it cannot be removed without injury to the property, the vendor thus places it within the power of the vendee to sell or mortgage the same to an innocent purchaser, and must suffer the loss if any occurs thereby.

Same: CONDITIONAL SALES: BONA FIDE PURCHASER: NOTICE. Where machinery is sold, the vendor knowing it is to be attached to the real property of a third person and used for a particular purpose, it is necessary, to charge such third party with notice of a conditional sale reserving title in the vendor until the full purchase price is paid, that he have actual notice of the reserved title; con-

structive notice effected by recording the contract is not sufficient under such circumstances.

Same: SALES: RECORDING ACTS: APPLICATION OF STATUTES. The
3 purpose of the recording acts is to provide a means by which the owner of property in the possession of a third person, or a lienholder, may protect himself as against the claims of third persons, on the theory that it cannot be known who might acquire title or rights from the party in possession; but the reason of the statute does not apply when the rights a third party is to acquire in the property are known to the seller of the personalty at the time of the sale.

Same: CONVERSION: ESTOPPEL: ELEMENTS OF DEFENSE: INSTRUCTION.

4 Where the vendor of machinery sold the same to a city contractor, with knowledge that it was to be permanently installed in the electric light plant of the city and used in connection therewith in such manner as to make it a part of the realty, and the city subsequently purchased the same of the contractor without notice of a provision in the original contract of sale by which the title was reserved to the seller until payment of the purchase price, it was not necessary for the city to show, in addition to the above facts, that it had paid the contractor for the same, as an essential element of its defense of estoppel in a suit by the seller against it for conversion.

Same: INSTRUCTIONS. Where it appeared from the evidence as in this

5 case that the fixtures were purchased by the contractor and placed in the city light plant at different times, and the issue as to the time the city received notice of the condition under which they were purchased by the contractor was also raised by the evidence, the court in submitting the question of plaintiff's right to assert its claim against the city should have distinguished between the fixtures placed in the plant before the alleged notice and those so placed thereafter.

Same: MEASURE OF DAMAGES: INSTRUCTIONS. Where an action for

6 the conversion of fixtures was tried on the theory that the original cost was competent evidence of the value of the same, failure to definitely instruct on the question of the reasonable value of the fixtures was not erroneous, in the absence of a request therefor.

Same: EVIDENCE. Refusal to permit the mayor of defendant city to

7 state in this case whether he would not have consented to placing the fixtures in the plant had he known of the reserved title in the seller, or to permit members of the city council to state whether they would have consented to allowing the contractor for the fix-

tures had they known of such reserved right, was not reversible error; although the evidence might properly have been admitted as bearing on the question of notice of such reserved title, and in support of the city's plea of estoppel.

Same: FIXTURES: CONVERSION: RIGHT OF RECOVERY. Where the title
8 to property has been changed from personalty to realty with the consent of the seller of the personalty his right of recovery is based upon the reasonable value of the property, rather than the right to recover the property itself.

Appeal from Cass District Court.—HON. E. B. WOODRUFF,
Judge.

SATURDAY, DECEMBER 13, 1913.

ACTION at law to recover for alleged conversion of electrical machinery and fixtures. From a verdict and judgment in favor of the plaintiff, this appeal is taken by the defendant.—*Reversed.*

Thomas Whitmore, W. R. Green, C. A. Meredith, and Thomas B. Swan, for appellant.

Max W. Babb, Willard & Willard, and H. C. Case, for appellee.

WITHROW, J.—I. This action was brought to recover for the conversion of certain electrical machinery. The appellee claims: That the appellant converted to its own use fifty-eight transformers, three exciters, one 230 K. W. generator, and one switchboard, and that by reason of said conversion the appellee is damaged in the sum of \$8,284.06, with interest thereon from November 8, 1911, at 6 per cent. That the appellee contracted said property to one Joseph A. Bortenlanger, conditionally, appellee retaining the title to or ownership of said property, "until full and final payment therefor shall have been made according to the terms of said contract, which

was as follows: 80 per cent. on or before the 10th of the month following shipment; 20 per cent. on completion of plant, but in any event not later than four months from date of shipment." The exciters and transformers arrived at Atlantic about the 18th day of July, 1911. The generator and switchboard reached Atlantic about the 26th day of July, 1911. No part of the consideration has ever been paid, and the appellant is in possession of said property in controversy, having refused to deliver the same to appellee upon demand made prior to the commencement of this action.

For answer the defendant claimed that the plaintiff sold, furnished, and delivered said transformers, exciters, generator, and switchboard, and each and all of them, to said Joseph A. Bortenlanger with the intention and for the purpose of having the said Bortenlanger use the same in the construction of a power plant and lighting system for the defendant city under a contract which the said Joseph A. Bortenlanger Company had with the defendant city, and the said Joseph A. Bortenlanger did so use the same with the knowledge and consent of the plaintiff. It therefore alleges: That plaintiff is barred and estopped from maintaining this action, because it first clothed Joseph A. Bortenlanger with the *indicia* of ownership by delivering the property in question to him, and then without objection stood by and permitted appellant, without any notice, actual or constructive, of the claim made thereto by appellee, to pay Joseph A. Bortenlanger, its contractor, \$3,352.40, or 90 per cent. of the estimated value of the transformers and exciters, and by reason of such payment the appellant claims to have the right of possession of all the property in controversy, and that the appellee is barred and estopped from asserting title thereto. That Joseph A. Bortenlanger, who had agreed with the appellant to furnish the material and build for it an electric light and power plant and install in said appellant's power house on appellant's land, used said property in controversy, and the same had become a fixture thereto, and thereby had become and was the abso-

lute property of the appellant. It is also pleaded and was proven that Bortenlanger failed to complete his contract, became insolvent, and that the defendant city was compelled to take charge of and finish the work at large expense to itself above the original contract price. It denies that it had notice, actual or constructive, of plaintiff's claim, alleges that payments were made by it to Bortenlanger under their contract from time to time as he became entitled to such, and that included in the estimates for which payments were made were the items for which recovery is now sought by the plaintiff.

There was a trial to a jury, resulting in a verdict in favor of plaintiff for \$8,284.06, with interest, and the defendant appeals.

II. The appellant is a city of the second class; the appellee was at the time of the transaction under consideration a foreign corporation, with its principal place of business outside of Iowa; and Joseph A. Bortenlanger and the Joseph A. Bortenlanger Company were also nonresidents of the state. Desiring to erect and establish an electric light plant for municipal purposes, the city of Atlantic, on the 21st day of March, 1911, entered into a contract with the Joseph A. Bortenlanger Company under which the latter, for a consideration of \$43,000 and certain old machinery, agreed to furnish and install the necessary machinery and fixtures, and to furnish all material and labor for the completion of the plant according to the plans and specifications which were made the basis of the contract. On March 15, 1911, Allis-Chalmers Company made proposal to furnish certain machinery for said work, such proposal having been directed to Mr. Joseph Bortenlanger for the city of Atlantic, Iowa, which was on the 15th day of March, 1911, accepted by Bortenlanger at Omaha, Neb., and on the 5th day of April, 1911, such was approved by the Allis-Chalmers Company at Milwaukee, Wis., thus completing the execution of the contract.

So far as is pertinent to the principal question raised in

the case, the provisions of the contract between Bortenlanger and the Allis-Chalmers Company were as follows:

The title and right of possession to the machinery herein specified remains in the company until all payments hereunder (including deferred payments and any notes or renewals thereof, if any) shall have been fully paid in cash, and it is agreed that the said machinery shall remain the personal property of the company, whatever may be the mode of attachment to realty or otherwise, until fully paid in cash. Upon failure to make payments, or any of them, as herein specified, the company may retain any and all partial payments which have been made, as liquidated damages, and shall be entitled to take immediate possession of said property, and be free to enter the premises where said machinery may be located, and to remove the same as its property, without prejudice to any further claims on account of damages which the company may suffer from any cause.

This contract was filed for record May 17, 1911, in the office of the county recorder of Cass county, Iowa, in which county is the city of Atlantic, which was before any part of the machinery claimed had been furnished; but, as both of the parties were nonresidents, such did not amount to constructive notice, were such sufficient. Code, section 2906. Four estimates were made of the work done by Bortenlanger under his contract with the city, and payments were made upon them in accordance with the provisions of the contract. Included in the estimates upon which payments were made were a considerable portion, but not all, of the machinery and equipment furnished by the Allis-Chalmers Company, but that which was not in the estimate was delivered and awaiting installation. No part of the money received by Bortenlanger was paid to the Allis-Chalmers Company. On the 9th day of September, 1911, by formal written notice to the mayor and city council of Atlantic, Bortenlanger abandoned the contract with the city, and thereafter the city caused the work to be completed.

It is claimed, and the evidence tends to support the fact, that while no actual notice of the reserved title in Allis-Chalmers Company was served on the mayor, or members of the city council, that notice was acquired by certain members of the council. It also is claimed that the engineer who prepared the original estimates for the city had notice of such claim, and that his relation to the city and to the work was such as to charge the city with notice. It appears, and the evidence tends to show, that the machinery and appliances furnished by the Allis-Chalmers Company were so erected and attached to the real estate owned by the city as to be a permanent and fixed improvement thereto, and a part of the real estate. It further appears by concession of counsel, which, however, was not in the presence of the jury, but to the court, that the appellee knew, before furnishing it, and when contracting with Bortenlanger, that it was intended to be so used.

III. Many errors are assigned. Some relate to instructions given, the failure to instruct upon questions directly raised by the pleadings, and rulings upon the admissibility of evidence. Many of them depend upon the determination of the law as to the ultimate right of recovery under conditions such as are here presented, and we therefore will first consider that which we conclude to be the controlling question in the case.

IV. The theory upon which the cause was tried in the district court was that the nonliability of the city must be made to depend upon want of notice by it of appellee's reserved title, and this element entered into the various counts pleaded by way of defense. The action in the present case is for conversion, based upon the alleged ownership of the property. It clearly appears from the evidence that the property was generally so attached to the real estate as to become a part of it, and that its removal could not be accomplished without substantial damage to the structure of which it forms a part. With these facts before us, together with

the knowledge by appellee of the use to which the machinery was to be put, together with the payments made by the appellant upon the estimates, we turn first to the law which governs the parties.

By the weight of authority it is held to be the rule that when a vendor sells machinery, which it is understood will become a part of the realty by being attached to it, and that it cannot be removed without injury, and thereby places it within the power of the vendee to so attach it, and sell or mortgage it to innocent purchasers, the better and more just rule is that the vendor must suffer. *Haven v. Emery*, 33 N. H. 69; *Voorheis v. McGinnis*, 48 N. Y. 278; *Hunt v. Iron Company*, 97 Mass. 279; *Porter v. Steel Co.*, 122 U. S. 267 (7 Sup. Ct. 1206, 30 L. Ed. 1210); *Jenks v. Colwell*, 66 Mich. 428 (33 N. W. 528, 11 Am. St. Rep. 502); *Wickes Bros. v. Hill*, 115 Mich. 333 (73 N. W. 375). In *Howell Mills Company v. Taunton Savings Bank*, 150 Mass. 519 (23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235), it was held that when machinery was furnished for the manufacture of collar cloth, and was placed in a mill already subject to mortgage, it became realty as against the mortgagor and his grantees, when it was heavy, not intended to be removed, but fastened in position to be used until worn out. This rule is recognized and adopted in *Thomson v. Smith*, 111 Iowa, 718, as applied to wagon scales, which were a part of the realty.

But we think it may and should be more broadly stated, as applied to conditions such as are under inquiry here. Where a sale of personal property is made, to be used for a particular purpose by a third party, and to become attached to and a part of the real estate, and when such a third party and the purpose is known to the seller as the one who is to receive such property under contract with the buyer to pay for it under certain conditions which will arise only between the buyer and the owner of the property, to protect itself in a reserved title under the contract with the buyer, the third

1. FIXTURES:
machinery.

2. SAME: condi-
tional sales:
bona fide pur-
chaser: notice.

party should have actual notice of such reserved claim, that it may protect itself against loss. This rule is based upon the principle of an estoppel, and is consonant with equity and fair dealing, and is in harmony with the thought in the cases above cited. And we are further of the opinion that constructive notice of such reserved right, under conditions stated above, would not be sufficient.

The object of the recording acts is to provide a means by which the owner of property in the possession of a third person, or the holder of a lien upon it, may protect himself as against the world. Based upon the theory

3. SAME: sales: recording acts: application of statutes. that it cannot know who might acquire rights or title from the person in possession, and as a measure of safety to the seller, and also as a bar against possible fraud, whoever may participate in it, such general protective provision is made; but the reason which is the basis of the statute providing for record does not exist when the one who, as third party, will acquire rights, is actually known to the seller. As against a plea of estoppel arising in such a case, we think constructive notice of the claim would not be sufficient. With this as a rule we consider the errors alleged.

V. Instruction No. 19, given by the trial court, in stating the elements which would constitute a defense to the claim, among other things said that if the machinery and appliances were placed inside the power house upon the

4. SAME: conversion: estoppel: elements of defense: instruction. land of defendant, and were adapted to and necessary to the plant, and if defendant relied upon the title of the property being in Bortenlanger, and paid to him 90 per cent. of the estimated value of the property, and that such was done before the defendant had actual notice of the contract between the plaintiff and Bortenlanger, then, if such facts were shown, the plaintiff would be estopped from asserting any claim to the property superior to that of the defendant. The giving of this instruction is charged as error.

While in one of the divisions of its answer in support of its plea of estoppel the defendant pleaded payment in accordance with the estimates, which were 90 per cent., in count 4 of its answer, in pleading the estoppel, it pleaded payment of large sums of money by it to Bortenlanger, without notice or knowledge of plaintiff's claim. In the view we have as to the law, we think the instruction as given places upon the defendant burdens heavier than it was obliged to bear; for, without notice on the part of the appellant of the reserved title in the appellee it could not be held that in addition to such facts the city must have paid the estimate allowance or 90 per cent. before its defense would be complete, and this is the effect of the given instruction. In no other instruction given by the trial court was a different requirement stated. Under the rule announced in the previous division of this opinion, we are of opinion that when machinery and equipment is furnished, as was this, with the knowledge of the vendor of the use to which it was to be put, and when such sale is followed by a delivery, and the use of the same in the construction in such manner as to make it a part of the real estate, the question of payment to the contractor or vendee cannot be a controlling element in fixing the right of third parties who had acted without notice. While as between the vendee and the city with which he contracted for the erection of the plant there would properly arise questions of right depending upon payment, they could not reach to one who was a stranger to the transaction. As between the Allis-Chalmers Company and the city of Atlantic there was no privity in any of the contracts. The appellee clothed Bortenlanger with apparent title to the property, assuming there was no notice of its claim, and, having then permitted him to use it under his contract with the city, and when it became fixed to the property of the city and was then of a permanent character, as between the vendor and the city without notice the right of the latter would be dominant.

VI. The evidence showed that the articles furnished by

the appellee were received and installed at different times. In its instruction presenting the claim of an estoppel the trial court made no distinction as to property which was placed in position before notice, and that which was installed after notice, if there was notice. In the evidence a question of fact arose, not only as to whether the city had notice, but also as to the time when it was received. The question was one which fairly arose in the case under the pleadings in the amendment to the answer, and in the proof, and it was the duty of the trial court to instruct the jury upon the ultimate questions thus arising. Being within the issues, a failure to so instruct was error. *Steele v. Crabtree*, 130 Iowa, 313.

VII. Instruction No. 17, which incorporated instruction No. 11 by reference, is claimed to have been erroneous. The two instructions stated the degree and nature of proof required before plaintiff could recover, and defeating the right of recovery only upon proof that "plaintiff is barred and estopped to claim title to said property, as against the defendant city, as will be hereafter explained." The only statement as to what would in the present case constitute an estoppel appears in instruction No. 19, to which we already have referred. We think in the several instructions bearing upon that question there was an omission to present to the jury the different rights pleaded by defendant, not only as to its liability for the whole claim, but also for such part of it, if any, as might be represented by machinery received and installed after notice, if any part had been so installed before notice.

VIII. Complaint is made of the failure of the trial court to state a measure of damages, or instruct upon the question of the reasonable value of the goods sought to be recovered.

The case seemed to proceed upon the theory that the contract or selling price was competent proof as to value, and as applied to articles of the character in question we do not hold that such theory was wrong; nor do we hold that a failure to instruct

5. SAME: instructions.

6. SAME: measure of damages: instructions.

more definitely upon that question was erroneous, in the absence of instructions so requesting.

IX. Error is urged in the refusal of the trial court to permit the mayor of Atlantic to testify whether he would have consented to the machinery being made a part of the plant, had he known there was a reserved title, and
7. SAME: evidence. also in not permitting members of the city council to testify whether they would have consented to allowing the contractor any sum for the transformers included in an estimate, had they known of the reserved right. While we think the evidence could properly have been admitted as bearing upon the question whether the city acted with or without notice, and in support of its plea of estoppel, yet, being no more than expression of purpose and not of fact, we would not reverse on that ground.

X. It is also urged that, under facts such as appear in this case, trover or conversion will not lie, as such proceeding can be based only upon the right to the possession of personal property. We are of opinion that where, by
8. SAME: fixtures: conversion: right of recovery. the consent of the vendor, the title to property has been changed from personalty to real estate, the right of recovery must rest upon the reasonable value of the property so used, rather than to the property itself. *Detroit Ry. Co. v. Busch*, 43 Mich. 571 (6 N. W. 90). We have treated the case upon the theory that the evidence tended to establish that the machinery and equipment had all become a part of the realty. It is the claim of the appellant that it did not, and upon this question we could not say the facts are free from dispute. Having indicated our view as to under what circumstances an action for conversion would lie, we have gone as far as the case now requires.

For the errors noted, the judgment of the lower court is *Reversed*.

WEAVER, C. J., and DEEMER and GAYNOR, JJ., concur.

In the Matter of the Assignment of A. B. THOMPSON, A.
L. LUICK, Assignee, Appellee.

Chattel mortgages: DESCRIPTION: ADDITION TO STOCK OF GOODS. The
1 printed provision of an ordinary chattel mortgage of farm property, that the same shall cover all increase from said stock, will not be construed to cover additions to a stock of goods, or substitutes therefor, made in the ordinary course of a mercantile business. An intention, however, clearly expressed in the mortgage that it shall cover not only the existing stock, but additions and substitutions made in the ordinary course of business, is valid.

Same: INCREASE. It is not necessary that the increase of mortgaged
2 personal property have a corporate identity at the time of the execution of the mortgage to be covered thereby, but it must be at least the increase of property which the mortgagor then had and in which he had a present interest.

Same: STOCK OF GOODS: SALES AND ADDITIONS: RIGHTS OF PARTIES.
3 Where the mortgagor purchased a stock of goods from the mortgagee, both living in the same town, and the mortgagor openly sold from the stock, replacing the same with other goods which were mingled with those mortgaged, apparently with the consent of the mortgagee, each was entitled to claim such share of the whole as the property to which each was entitled bore to the whole mass.

Same: CONFUSION OF GOODS: RIGHTS OF PARTIES. Where a loss occurs
4 from a confusion of goods the party causing the confusion must suffer, if he is unable to distinguish and separate his property.

Where the confusion is by the consent of the parties the relationship of the goods rests upon the agreement of the parties involved in the consent, and the presumption is that they are tenants in common.

Where the confusion is tortious the loss will fall upon the party wrongfully creating the confusion, except where the property is all parts of equal value and ascertainable with respect to the whole, when each will be entitled to his own proportion; but the party chargeable with the wrongful confusion has the burden of distinguishing his own property.

Same. Where the confusion of goods is innocent, by mistake or negligently done, the party causing the confusion must be able to designate his own property or he will lose the whole to the other party; but where the equities of the parties are equal and the confusion resulted from inevitable accident each party has a common interest in the whole to the extent of his contribution thereto.

Same: STOCK OF GOODS: MORTGAGE: SALES AND ADDITIONS: RIGHTS OF PARTIES. Where the mortgagee of a stock of goods consented to a sale therefrom by the mortgagor in the regular course of trade, and other goods were purchased by him and substituted for those sold, neither was entitled to the whole stock but to his share in proportion to his contribution thereto.
WEAVER, J., dissenting.

Appeal from Wright District Court.—HON. F. D. LETTS,
Judge.

TUESDAY, JANUARY 27, 1914.

A. B. THOMPSON, having made a general assignment for the benefit of all his creditors to one A. L. Luick, the Ft. Dodge Grocery Company filed an application in said proceedings to have a certain mortgage executed to it made a first lien upon certain property in the hands of the assignee claimed to have been covered by and included in its mortgage. The opinion states the facts.—*Reversed and Remanded.*

P. F. Nugent, for appellant Ft. Dodge Grocery Co.

Nagle & Nagle, for appellee Belmond Savings Bank.

W. E. Bullard, for appellee Luick, assignee.

GAYNOR, J.—On the 27th day of October, 1909, A. B. Thompson purchased a stock of goods from the Belmond Savings Bank. At the time he purchased it, the stock invoiced at \$3,900. At the same time, Thompson executed a mortgage to the Belmond Savings Bank, upon the stock of goods so purchased, to secure the payment of sixty-eight promissory

notes, dated on that day, each for \$50; the first payable on the 27th day of November, 1909, and \$50 on the same day of each month succeeding until all were paid, with interest at 6 per cent. The property mortgaged was described as follows:

All my entire stock of grocery goods, consisting of glass and crockery, woodenware, confectionery in glass and boxes, including both glass and jars, trays and boxes; also all canned goods, cigars, smoking tobacco and tobacco of every kind; also all nuts and fruits, and all other things not enumerated, and such as are usually kept in a grocery store; all showcases, including candy and cigar cases; also all other fixtures and furniture as connected therewith; also gasoline lighting plant, scales, safe, short account system, refrigerator and oil tanks, delivery team, harness and wagon; all located on the E. 1/3 of lot 1, block 25, Belmond, Iowa. (There was further provision in the mortgage as follows:) All increase from said stock of whatever kind or nature.

After the purchase of said stock and the execution of the mortgage, Thompson commenced to do a retail business in the same building in which the stock was located, and continued to do business in the same store until the 31st day of October, 1911, at which time he made a general assignment of all his property, including the stock and property mortgaged as aforesaid, for the benefit of his creditors.

It appears that, at the time of the making of the deed of assignment, the property in the store building hereinbefore described, including the property in existence at the time the mortgage was executed, invoiced at \$2,900. The assignee of Thompson, under order of the court, sold all the property in controversy here; and at the February term, 1912, filed his report, in which he sets out the entire indebtedness of the estate and the assets in his hands, and asks that he be authorized and directed to pay to the Belmond Savings Bank the amount realized from the sale of the chattels claimed to be covered by the mortgage, and that said mortgage debt be first paid out of the proceeds of the sale of the stock claimed to be covered by

the mortgage. To this portion of the report, the Ft. Dodge Grocery filed objections, alleging that the mortgage, at the time of the assignment, did not cover any of the stock then on hand; that, since the execution of the mortgage, and prior to the time of the making of the assignment, Thompson had been selling from said stock at retail, and had been replacing them with new goods, and that at the time of the assignment he had in the store an entirely different stock of goods than that upon which the chattel mortgage rested, and that the chattel mortgage itself did not cover additions to the stock, and did not cover stock placed in there after the making of the mortgage.

The mortgage on which the bank relies was evidently written on an ordinary farm mortgage. After describing the stock of goods, it reads as follows: "All increase from

1. CHATTEL MORTGAGES: description: addition to stock of goods. said stock of whatever kind or nature, the above-described stock being kept in my possession on Section No.

Township No Range No. West of the 5th P. M. of Iowa"—indicating that this part of the mortgage was not considered of importance in making the contract between the parties. There were blanks left unfilled as appeared in the instrument. The word "increase" appearing therein, upon which the bank relies, was evidently not placed there by the parties for the purpose for which it is now contended it should be used. Nor can we gather therefrom that it was advisedly placed there by the parties, but permitted to remain there because it was in the form of mortgage used. If it had been the intent of the parties to give it the meaning that is now contended for, more apt words could be used to express that intent. Indeed, we think that, if it had been the intent of the parties to make this refer to the substantive part of the mortgage, they would not have used the word relied on, but would have used the words "additions thereto," or substitutions therefor, made in the ordinary course of business. We are satisfied that this word

“increase” cannot be given the meaning contended for by the bank.

In the deed of assignment made by Thompson, he described the property deeded as follows: “The entire stock of groceries consisting of groceries, canned and in glass, teas, coffees, spices, sugars, cereals, soaps, candies, and everything else connected with and pertaining thereto, as now kept and contained in the two-story building situated upon the east one-third of lot 1 in block 25 in the original town of Belmond; all showcases, fixtures and furniture contained in said building, above described, on the first floor thereof, together with one National Cash Register, one team of horses, delivery wagon, together with wagon and harness.” There is no question made in this record as to the right of the bank to take precedence over general creditors of the assignor as to all property actually covered by the mortgage at the time of the assignment.

The contention is, on the part of the Ft. Dodge Grocery Company, that there was no provision in the mortgage covering after-acquired property or that created any lien in favor of the mortgagee upon any property in the stock which was placed there by the mortgagor after the execution of the mortgage; that the word “increase” does not cover after-acquired property, though the same was in fact acquired from the proceeds of the sale of the mortgaged property. This contention of the objector, the grocery company, must be sustained for the reason that at common law nothing could be mortgaged that was not in existence at the time of the mortgage and did not, at the time of the mortgage, belong to the mortgagor. This was founded on the rule that what a man has not got he cannot give; but this rule was somewhat modified so as to cover property in which the mortgagor had a potential interest or ownership at the time of the execution of the mortgage. Thus it has been held that the increase of stock mortgaged may be covered by the mortgage, though not in being at the time of the execution of the mort-

gage. Crops to be grown upon certain premises owned or controlled by the mortgagor may be mortgaged. The wool upon certain sheep owned by the mortgagor at the time of the execution of the mortgage may be anticipated in the mortgage. But it is essential that he own the thing out of which the nonexistent thing must proceed, or does proceed. Or, in other words, it has been held that he may sell or mortgage the natural and expected product, growth, or increase of his own property, and this is peculiarly good as to third persons, where the property is not delivered into the possession of the mortgagee, and where the only notice of the thing intended to be mortgaged, or covered by the mortgage, is the constructive notice given by the recording of the mortgage itself. In no sense can new goods, though purchased and paid for out of the proceeds of the old goods, be said to be the natural increase of, or proceeding from, the goods then in existence. The added stock is entirely independent of the old stock for its creation, development, growth, and existence. It is newly acquired property, in no way proceeding from the old, placed with the old stock, or among the old goods, by the hand of the mortgagor.

In Jones on Chattel Mortgages (4th Ed.) section 154, it is said: "The fact that new goods were acquired by way of renewal of old goods on hand, or in substitution for them, or were paid for out of the proceeds of the old, has seemed, in a few cases, to be the ground upon which the mortgage has been sustained as a lien upon the new goods; yet this ground has been so often declared ineffectual to give the mortgage any validity as to goods subsequently acquired, that no exception to the general rule prevailing at law, requiring such mortgages, can be sustained. The courts have gone so far as to hold that a mortgage covering renewals and substitutions for the goods in stock covered by the mortgage would not, in law, give the mortgagee a right of action against the creditors, or subsequent mortgagee seizing them."

In this state, the doctrine has been adopted that, in cases

of stocks of goods, a party may, by express terms, mortgage, and his mortgage may be made to cover, not only the stock then in existence, but additions and substitutions thereafter made in the ordinary course of business, and this is the doctrine in many of the states. But the intention to do so must be clearly expressed in the mortgage, so as to charge persons dealing with the stock with notice of that fact. We have not to deal with that question here, for no attempt was made to mortgage additions or substitutions.

The only reference in the mortgage to anything other than the property then in existence and described in the mortgage is found in the word "increase" thereof. The rule generally

2. **SAME:**
increase.

stated as to increase is that, while the increase itself intended to be mortgaged need not at the time have identity or separate entity, yet it must at least be the product or growth or increase of property which at the time has a corporal existence, and in which the mortgagor has a present interest, and which is covered by the mortgage. Supporting this doctrine see *Varnum v. State*, 78 Ala. 30; *Paden v. Bellinger*, 87 Ala. 575 (6 South. 351); *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195 (26 Am. Dec. 262); *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193 (20 N. W. 85); *Farmers' L. & T. Co. v. Long Beach Imp. Co.*, 27 Hun. (N. Y.) 89.

In *Phillips & Son v. Both*, 58 Iowa, 499, the chattel mortgage on a stock of goods contains this clause: "The said grantor to have the privilege of retailing said stock, but to keep up said stock as fully as it now is as nearly as possible." The court said: "Did the mortgage cover goods afterwards purchased and added to the stock on hand at the date of the mortgage? We think it did not. The rule in this state is that the chattel mortgage may be made to cover future acquisitions of property"—citing *Scharfenburg v. Bishop*, 35 Iowa, 60; *Fejavary v. Broesch*, 52 Iowa, 88; *Stephens v. Pence*, 56 Iowa, 257. The court further says:

An examination of these cases will show, however, that,

in such of them as involve mortgages upon stocks of merchandise, the mortgages expressly provide that future acquisitions to the stock shall be held as included in the mortgage. The mortgage in the case at bar makes no such provision. It is true it refers to a stock of boots and shoes and clothing, but it also schedules and describes the mortgaged goods. There were no goods mortgaged except such as are scheduled, because the language is that it is 'the property described in the following schedule.' It may be that the parties intended to include future acquisitions of goods. The provision that the mortgagor should keep up the stock would seem to indicate something in that direction. . . . The rule allowing property to be mortgaged which is not yet in being, or not owned by the mortgagor, has, in our opinion, been extended quite far enough without allowing it to be done by mere inference.

The second proposition submitted is whether or not the fact that the mortgagee permitted the mortgagor to sell the goods in the ordinary course of business, to purchase other goods and intermingle them with the property

3. SAME: stock of goods: sales and additions: rights of parties. mortgaged (where the evidence showed that, at the time of the assignment, there was very little of the original property left) can the mortgagee, after the property has passed into the hands of the assignee of the mortgagor (where the assignment is made for the benefit of all the creditors), insist upon a right to appropriate all the property in the hands of the assignee to the satisfaction of his claim, on the theory of a wrongful intermingling and confusion of property?

The only evidence in the record is that given by the mortgagor, Thompson, and it is to this effect, that the stock, when purchased from the bank, was an old stock. "After I purchased the stock, I commenced to do business where the stock was located. I did a general retail business, and added to the stock by purchases. I cannot tell how much my purchases amounted to, but were pretty large. It would run to about \$1,000 a month. Was in business three years. At the

time I purchased the store, it invoiced at \$3,900. There was very little of the old stock on hand at the time I made this assignment. At the time I was running the business, I aimed to dispose of the old stock and replace it with new. There was very little of the old stuff left. I made no figure of it. I don't believe there was over a couple of hundred dollars worth of the old stock left. I never made any attempt to separate them. I turned it over in bulk."

It appears that the mortgagor purchased this stock from the mortgagee. It appears that the mortgagee and mortgagor resided in the same town; that the mortgagor had been openly and publicly selling goods from this stock, and, we must presume, with the knowledge of the mortgagee. The mortgagee, in its mortgage, had retained no lien upon afterwards acquired or substituted goods. The mingling was evidently with the consent of the mortgagee. Can it claim goods not covered by the mortgage, on the theory that the goods mortgaged to it were wrongfully commingled with the goods upon which he had no lien, and which, but for his claim, would have passed, under the deed of assignment, to the assignee for the use and benefit of all the creditors?

The foundation of the doctrine of confusion of goods is the affording of protection to the innocent owner. The loss and inconvenience arising from such confusion is therefore upon the party who causes the confusion, and it is for him to distinguish and separate his own property or lose it.

In Jones on Chattel Mortgages, section 483, it is said: "Where the confusion of the goods has taken place by the permissive act of the mortgagee, he is not allowed to defeat the rights of the judgment creditor by claiming the goods under his mortgage. If, under such a mortgage, the mortgagee has permitted sale to be made by the mortgagor, and the latter afterwards makes an assignment for the benefit of creditors, and the assignee sells the goods, the mortgagee is entitled to only such part of the proceeds as come from

4. SAME: Confusion of goods: rights of parties.

the sale of the goods embraced in the mortgage, and the burden is on him to show what goods, sold by the assignee, were subject to the mortgage lien. If he has allowed the goods mortgaged to be so intermingled with goods afterwards purchased as to prevent the ascertainment of those on hand when the mortgage was given, he must suffer the loss"—citing authorities.

It is said that four cases may arise in which there may be a confusion of rights involved in the confusion of goods: (1) Where the mixture is made by consent of parties. (2) Where it arises from the willful or tortious conduct of one of the parties. (3) Where it is made by unintentional mistake. (4) Where it is the result of inevitable accident.

Where the mixture is by consent of the parties, the relationship to the goods, after confusion, would rest upon the contract between the parties involved in the consent, and the presumption would be that they were tenants in common.

Where the confusion is tortious, the party whose wrongful conduct created the confusion must lose, but this rule has been modified in cases where the property is all parts of equal value, and the value of each part is ascertainable, with relationship to the value of the whole thing as produced by the confusion, and parties will be tenants in common, and each will be entitled to his own proportion, but every presumption and intendment is against the wrongdoer, against the party whose wrongful act produced the confusion, and the burden would rest upon him to distinguish his property, if possible, from that with which it has been intermingled.

Where, however, the intermixture is innocent, or by mistake, or even negligently done, where there is no willful fraud involved, the party causing the confusion would not lose his property, but he does not gain anything by it, and will be required, in order to protect himself, to point out and designate his property, or

he loses the whole to the party with whose it is intermingled.

But where the equities of the parties are equal, and the confusion is the result of inevitable accident, the parties would have an interest in the whole mass to the extent of the contribution thereto of his property, or they would be tenants in common in proportion to the amount of property contributed to the confused mass.

Assuming, from the relationship of the parties, that the mortgagee consented to the mortgagor's selling the goods mortgaged, and purchasing other goods and intermingling

6. SAME: stock of goods: mortgage: sales and additions: rights of parties. them with the goods mortgaged, then, under the rule hereinbefore stated, the relationship to the goods of the parties, after confusion, would not entitle either to the whole, but to

his proportionate share of the whole mass, and to such proportionate share of the whole mass as the property contributed by him thereto bears to the whole mass, and no more. So in this case the testimony disclosing that the mortgaged goods in question on hand at the time of the assignment did not exceed \$200, the bank's right in the property would be such proportionate share of the whole amount as its property bears thereto, and this should be allowed to the bank under its mortgage, and this is equitable as between the bank and the other creditors, and we think, therefore, the court erred in holding that the entire proceeds of the stock should go to the mortgagee, and the decree of the court is therefore modified to the extent of allowing the mortgagee the proceeds of the sale of all property covered by the mortgage which remained in the possession of the mortgagee and was not mingled or confused with other goods, such as the showcases and other tangible property, and such a proportionate share of the proceeds of the whole stock of goods as the value of the mortgaged property therein remaining bears to the value of the whole mass; they being tenants in common in proportion to their respective shares.

The cause is therefore reversed and remanded, with directions to proceed in accordance with this opinion in the apportionment of the mortgaged property among the creditors of the estate.—*Reversed and Remanded.*

DEEMER, LADD, and WITHROW, JJ., concur.

WEAVER, J. (dissenting).—In my judgment there is no fair room to doubt that the parties to the mortgage intended and understood that the lien thereof would attach to any and all additions thereafter made to the stock of goods. The word “increase,” though perhaps not one most ordinarily employed to express that idea, may yet be used for that purpose without notating any of the usages of our language. Among the definitions of “increase” given by the Century Dictionary in an “amount or number added to the original stock or by which the original stock is augmented; augmentation.” Webster defines the verb “to increase” as “to make greater in bulk, quantity, or number; to add to.” It will thus be seen that the language of the mortgage aptly expresses the idea of additions made to the mortgaged property.

In my judgment, the decree below should be *Affirmed.*

STATE OF IOWA, Appellant, v. CARRIE LIVINGSTON, ET AL.,
Appellees.

Waters: TITLE TO BED OF NON-NAVIGABLE STREAM. A government section was surveyed as fractional and divided into lots and included also a meandered tract designated as a lake, but which in fact was a slough that in times of high water was overflowed but ordinarily contained little water. Gradually it was filled with sediment deposited by the overflow so that it was tillable except in time of high water. The section was granted to the state as swamp and overflowed land, but the patent described simply the lots, omitting the slough. Subsequently the state conveyed the entire section to the county. *Held*, that the county thus acquired the title to the entire

section and that the state had no such interest by reason of its sovereignty that it could prevent the owners of the several lots from exercising a proprietary interest over the bed of the slough.

Same: MEANDER LINES: RIPARIAN RIGHTS: ACCRETIONS. While the
2 meandering of a stream by the government survey is conclusive as to the navigability of the stream so far as the rights of riparian owners are concerned, still the meander line is not in a strict and conclusive sense a boundary line; as the riparian owner has rights in the accretions beyond that line.

Same. The owner of land adjoining a navigable stream has a right
3 of accretion, while in case of a non-navigable stream the adjoining proprietor owns to the center of the stream and is entitled to all that may be added to the land by accretion or otherwise within that limit.

Same: ACTION BY STATE TO QUIET TITLE: ESTOPPEL. Where the waters
4 of a slough or bayou receded and it ceased to be a running stream, and as a result of overflow water soil was gradually deposited therein until it became suitable for cultivation, and was so used by the riparian owners for at least ten years, their rights therein were of such character as to justify a denial of relief in an action by the state to quiet title to the slough, on the ground of laches and estoppel.

Same: LIMITATIONS: LACHES: ESTOPPEL. The statute of limitations
5 cannot be urged against the state, but where it seeks to establish rights by an action to quiet title, relief may be denied on the ground of laches and estoppel.

Appeal from Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

TUESDAY, JANUARY 27, 1914.

ACTION to quiet title in real estate. From a decree in favor of defendants, the plaintiff appeals.—*Affirmed.*

George Cosson, Attorney General, C. A. Robbins, Assistant Attorney General, and Frank J. Capell, County Attorney, for the State.

George H. Mayne and Fremont Benjamin, for appellees Eyberg and Turk, administrator.

John M. Calvin, for appellee Foote.

Tinley & Mitchell, for appellees Livingston, Jennings, and Beno.

WITHROW, J.—The defendants are owners of real estate in Pottawattamie county, holding under conveyances from that county, which describe the several tracts as lots 1, 2, 3, and 4 in section 22, township 76, range 44. The title of the county upon which was based the conveyances to defendants and their grantors was derived from the state and its title came from the general government. In 1857 the United States government caused to be made a survey of the lands in section 22, and in other sections adjacent and connecting. At the time of the survey there was a body of water covering parts of sections 21, 22, 27, and 28, which was known and designated as Boyer Lake, and meander lines were run, and such line was fixed in the measurements made as the boundaries of the tracts on the water side of the lands. Under the survey thus made lot 1 contained 61.60 acres, lot 2, 24.40 acres, lot 3, 63.90 acres, and lot 4, 71.30 acres. Lots 5, 6, and 7 are not material to this inquiry, save as to the included acreage of the government grant, which will be hereafter noticed. Some years after this survey there was a change in the course of Boyer river, which up to that time had flowed through a channel over section 22, and with the backwaters of the Missouri river covered with water that part of the territory designated as Boyer Lake; and as a result of this change, there was a recession of the waters so that the land now in dispute was no longer covered with water excepting in times of high water, when the backwaters of the Missouri river, and the flow from the north and east, would for a time again cover it, but soon passing away. These overflows had

the effect at each time of adding to the soil by deposits of soil and other substances, and in time and for forty years or more what was in 1857 designated as Boyer Lake had been occupied and used for agricultural and other useful purposes, subject to the overflows which we have mentioned. The defendants and their grantors have by occupancy claimed the lands thus freed from the burden of the water under the right of accretion and reliction, so far as such within section 22 have formed an extension or addition to their several lots. This action is brought by the state for the purpose of establishing and quieting its title to the real estate in controversy, claiming that it acquired title to the remainder of the lands not included in the description of the lots by virtue of its sovereignty and its admission into the Union, the same being at that time a lake known as Boyer Lake. It asks that the several defendants be enjoined from exercising control over the bed of such meandered lake, and from by-ditches or obstructions interfering with the natural flow of water to it. The defendants claim that the land in question never was a lake, but an outlet of Boyer river or an arm of the Missouri river. They also claim that the state of Iowa never had any interest in the land in controversy, for if it was a lake, having been meandered, and gradually filled, and such filling accreted to the adjoining banks, it would have no right to it; and, if it was the mouth of Boyer river or an arm of the Missouri river, the riparian owners would have the right of accretion. The defendants also pleaded laches and estoppel against the state, based upon occupancy of and improvements made upon the land, under claim of title, continuing for more than ten years, and also that they have for many years paid taxes upon said lands. The trial court found the equities of the case to be with the defendants, and dismissed plaintiff's bill. From the decree entered upon such finding the state of Iowa appeals.

I. Without in detail reciting the evidence introduced upon the trial, we find in it full warrant for the conclusion

of the trial court as to the ultimate facts which we adopt, and which was as follows:

That, of the time of the original survey of section 22 by the United States, it was surveyed as a fractional section, consisting of lots 1, 2, 3, 4, 5, 6, and 7 and a meandered tract which the engineers designated as 'Boyer Lake.' That the so-called Boyer Lake, which was thus meandered by the surveyors, was not in fact a lake, but was a bayou or slough or arm of the Missouri river, which in time of high water was overflowed, but in time of ordinary stages of water contained little or no water. That it was not a part of the channel of the Missouri river at that time, and that the east bank of the Missouri river at that time was west of the center line of section 21. That the so-called Boyer Lake was not a navigable body of water, but was a slough, or bayou, into which the waters of the Missouri river backed in time of high stages, and into which the waters of the Boyer river and Pigeon creek emptied in time of freshets. That said low slough or bayou gradually was filled with sediment deposited by such backwaters and such overflows, and accreted to the lands bordering thereon. That the survey in question was made at a time of high water, as is shown by the notes of the engineers at the time, and at a time when this bayou was filled with backwater.

These conclusions render it unnecessary to consider some of the questions which have been argued.

II. In 1860 the general government issued to the state of Iowa its patent for certain lands designated as swamp or overflow lands, included in which was the whole of section 22.

1. WATERS: title to bed of non-navigable stream. Under this grant there was selected and approved by the Secretary of the Interior, 352.90 acres in section 22, being that part of the section covered by the particular description of the several lots with their meander boundaries, and not in terms including that part designated by the survey of 1857 as Boyer Lake. Following this patent, and in the same year, the state of Iowa issued its patent to Pottawattamie county, conveying

to it all of section 22; and, based upon such prior conveyances, the defendants and their grantors became the owners in fee of lots 1, 2, 3, and 4. In 1901 the then owners of lots 1 and 2 in section 22 obtained in the superior court of Council Bluffs a decree against Pottawattamie county, the grantee of the state, and also against the owners of all property bounded on the old bed of Boyer Lake, so-called, quieting and confirming in them the title to that part of the old bed lying east of said lots 1 and 2 and west of Pigeon creek. The state was not a party to these proceedings. It is not claimed by the state that it now holds title to any part of the real estate by virtue of the patent to it issued by the United States, for whatever right and title it then received was fully transferred by its conveyance to Pottawattamie county. Its right, if any, then, must depend upon the claim made in argument that, the stream or body of water having been meandered, such is conclusive that the stream was navigable in so far as navigability affects the boundary line of riparian lands, or if it was in fact a lake, navigable or nonnavigable, or a part of the Missouri river, or a temporary body of water not proper to have been meandered, the boundary line of the riparian owners stops at high-water mark, or the meandered line, and that the state in the exercise of its sovereign powers has the right to protect for the people the land not thus included.

III. The patent from the United States to the state of Iowa was a grant to the state of lands in section 22, designated as swamp or overflow lands; and, while the grant in terms covered the entire section, the number of acres named corresponded with that covered by the areas of the several lots which had been surveyed. The subsequent patent issued by the state to Pottawattamie county covered all of section 22, with other lands, and contained no statement by way of limitation of the quantity conveyed. In *State v. Jones*, 143 Iowa, 408, this court has recognized the right of the state to maintain action to prevent persons without title from exercising a proprietary interest over a lake or lake bed, the theory

of the decision being that the title to the bed of a nonnavigable meandered lake does not pass to the owners of platted lands bordering upon it, but, in the absence of conveyance by patent, remains in the general government, reserved in trust for all the people of the state in which it lies. Upon this rule plaintiff rests its right to sue. The reason for the rule, which relates only to lakes, is given as being to preserve to the people the free right of boating, fishing, and the like, and not for any use or benefit which might be had of the lake bed when free from water. But when the land has emerged, and that which was designated as a lake has passed away and the soil is used for agriculture, another inquiry arises. In such case we are then carried back to the original patent to determine its effect upon the area then covered by water. In *Foss v. Johnstone*, 158 Cal. 119 (110 Pac. 294), it is held that "a government patent to land, bordering on a nonnavigable pond, which expressly declares that it grants lots mentioned, and that they contain a stated number of acres, which is the same number of acres mentioned in the plat, does not show an intent to only grant the stated number of acres, and to make the meander line the boundary, since it is the practice of the government in disposing of the public lands to measure the price to be paid by the quantity of upland without making any charge for the land under water." The same rule is stated in *Hardin v. Jordan*, 140 U. S. 384 (11 Sup. Ct. 808, 838, 35 L. Ed. 428). In many states, including California, it has been held that the title of the abutting owners extends to the center of the lake, and the cited cases were based upon that rule; but in this state when applied to lakes the rule is different, and ownership rights are limited by the meander line, but not so as to nonnavigable streams. *Wright v. Council Bluffs*, 130 Iowa, 274; *State v. Thompson*, 134 Iowa, 25; *State v. Jones*, *supra*.

But this body of water was not a lake; it received its supply not from subterranean springs, or other sources which distinguish a lake from a bayou or arm of a large stream,

but was a bed which was covered by overflow, and in many respects, because of what may be termed its upper inlet, was for the time part of a running stream, and properly came with the government designation of overflow land, and therefore presented a condition analogous to that considered in the *Foss* and *Hardin* cases, the ownership in each instance reaching to the middle. Recognizing this as its character, we think the rule in the *Foss* case, *supra*, although relating to a pond in which the right of ownership of the bed differed from the rule in Iowa is the true guide as to the effect to place upon the conveyance made by the United States in its patent. In the subsequent patent made by the state of Iowa to Pottawattamie county the conveyance covered the whole of section 22 without reservation. The whole of that section passed to the state under the federal patent, and its later conveyance passed the full title to Pottawattamie county. It is not a case where by reason of want of conveyance, there is an implied reservation by the United States in trust for the people of the state, but one in which there was no reserved title but a conveyance of all. We are of opinion that the state of Iowa has no such interest in the lands as entitled it to maintain this action. We might well rest our decision at this point; but in the interest of settled titles we deem it proper to go farther.

IV. The fact that a body of water has been meandered, in surveys made under the authority of the United States government, and under instructions from its proper department to thus meander navigable streams, has been often held to be conclusive as to its navigability, so far as the rights of riparian owners are concerned; but this relates, not to the question of navigability in fact, but to the meander lines which are established as boundaries, and which control as to sales made in accordance with such boundaries. *Park Commissioners v. Taylor*, 133 Iowa, 458, and, as applied to meandered lakes, *State v. Jones, supra*. But the meander line thus run does

2. SAME: meander
lines: riparian
rights: accre-
tions.

not, in a strict and conclusive sense, constitute a boundary line, for beyond it the riparian owner has such rights of ownership in the lands as result from accretion. *Berry v. Hoogendoorn*, 133 Iowa, 437.

Resting upon the conclusion that the body of water designated as Boyer Lake never was a lake but was caused by the flow of the Boyer river and smaller upper streams, and by waters from the Missouri river of which it was

3. SAME.

an arm, we exclude from necessary consideration the question of rights under the law arising from the emergence of and title to lake beds, and turn to the question of the right to accretions and reliction on meandered nonnavigable streams, for such we hold the present record shows Boyer Lake to have been. That the adjoining proprietor has such rights in the case of navigable streams is a rule so well settled as to be beyond controversy. *Berry v. Hoogendoorn*, *supra*; *Stern v. Fountain*, 112 Iowa, 96.

If the stream be nonnavigable, it is the rule that adjoining proprietors hold to its thread or center, and of course become entitled to all that may be added to the land by accretions, or otherwise within that limit. *Noyes v. Collins*, 92 Iowa, 568; *Moffett v. Brewer*, 1 G. Greene, 348; 5 Cyc. 897.

It clearly appears from the evidence that by the change in the course of Boyer river the land in question no longer served as the channel for a running stream, if it ever had

4. SAME: action
by state to
quit title: es-
toppel.

been continuously so, and that there was a recession of the waters, leaving the land in part uncovered, and by later freshets, overflows, and backwaters, and their resulting deposits upon the land there were formed accretions to the lands of the defendants. At each overflow there was noticeable deposit of soil, until in the course of time this became of considerable depth, gradually lifting its surface until it became suitable for agriculture, and as such the evidence shows has been used by defendants and their grantors for many years more than the period fixed as barring a right of action as between individ-

nals. These accretions were of such character as to come quite within the rule adopted by this court in *Coulthard v. Stevens*, 84 Iowa, 245. "The terms 'alluvion,' on the one hand, and 'gradual' and 'imperceptible' accretion on the other, are used by writers to contradistinguish a sudden disruption of a piece of ground from the land of one man to another, which may be followed and identified, from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification."

It is claimed that the change in the course of Boyer river was sudden, and that there was not such a gradual recession of the waters covering this land as to bring the case within the rules which recognize the right to land resulting from reliction, and also that by ditches and otherwise the defendants and their grantors have aided the discharge of the water, which was therefore not from natural causes. We do not find in the evidence that which would justify the finding that the efforts towards drainage materially affected the original cause which resulted in opening the land to use, or the rights which had arisen because of such, but rather were after the cause had affected the main result, and the drainage means employed were not improper as an aid to the better use of the land.

While the original change in the course of Boyer river was sudden, in the sense that its flowage was by obstructions and other causes diverted to a different course, thereby relieving the land of the burden occasioned by the flow over it in times of high water, the evidence shows that for years following that change, by the backwater of the Missouri river and the freshet water of other small streams which flowed into the old Boyer river channel, and in times of overflows, there were formed the soil deposits which we have noted, and this was gradual, originally commencing at the north, and moving to the south, continuing over a period of many years, and resulting in such building of the soil as to render it fit for agriculture, and so used, as testified by one witness, for

over forty years, subject to the annual overflows which with the passage of time and soil deposits affected less of it each year. Other witnesses fix the time of occupancy and use at less than forty years, but the lowest is much in excess of ten years. These facts at least afforded to the occupants of the lands a basis for their claim of right, and under them they for many years asserted ownership of this land without protest or hindrance.

V. Whatever may at one time have been the superior rights of others, if there were such, under this state of facts it is quite clear that, if this action were between individuals,

the plaintiff would fail as against the plea of
5. SAME: limitations: laches: estoppel. adverse possession, as there can be no doubt

that for a period longer than ten years the defendants and their grantors have been in possession of this real estate, claiming it as rights resulting from accretion, as well as under their conveyances—as to a part of the land title being quieted by them as against Pottawattamie county—and have used it for the purposes of husbandry, and made improvements by way of fences. While it is the general rule that the statute of limitations cannot be urged against the sovereign, the right to rely upon an estoppel by acquiescence and the plea of laches is recognized by many courts, including our own, and is based upon principles of equity. *State v. Des Moines*, 96 Iowa, 534; *State of Iowa v. Carr*, 191 Fed. 257 (112 C. C. A. 477); *State of Indiana v. Milk* (C. C.) 11 Fed. 389; *United States v. McElroy* (C. C.) 25 Fed. 804; *State of Michigan v. Jackson*, 69 Fed. 116 (16 C. C. A. 345).

We think that after permitting these many years of uninterrupted enjoyment of the property in question, under claim of right, the state, had it the right to sue, should not now be permitted to disturb it; but, having invoked the power of a court of equity to establish its rights, it should be bound by the rules of conscience which guide its chosen forum. We hold that it may not now assert title to or the right of control

for the whole people of this real estate, and that the decree of the trial court should be *Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

STATE OF IOWA, Appellee, v. H. D. KELLY, Appellant.

Criminal law: MURDER: VARIANCE. Under an indictment charging
1 defendant with having killed deceased on a certain date, the jury was not at liberty to find that the crime was committed on another date within the statutory period.

Same: SPECIAL FINDING: PRESUMPTION. Where the undisputed evi-
2 dence showed that defendant killed deceased on a certain date, as charged in the indictment, it will be assumed from the affirmative answer to a special interrogatory, as to whether defendant was insane at the time he shot and killed deceased, that the crime was committed on that date.

Same: SPECIAL FINDING: GENERAL VERDICT: CONFLICT: NEW TRIAL.
3 A general verdict of guilty and also an affirmative answer to a special interrogatory finding defendant insane on the day he shot and killed deceased, after the instruction of the court that the act was not excusable if defendant was able to control his acts although he might have been mentally unsound to some degree, presented such a doubtful finding regarding defendant's sanity at the time of the act as to require a new trial.

PRESTON J. in a separate opinion.

Appeal from Polk District Court.—HON. CHARLES S. BRADSHAW, Judge.

TUESDAY, JANUARY 20, 1914.

INDICTMENT for murder in the first degree. Special defense, insanity. Verdict of manslaughter and a special finding that the defendant was insane at the time of the commission of the act. Judgment on the general verdict. Defendant appeals. Reversed on the ground that there is an apparent

inconsistency between the special finding of the jury and the general verdict.—*Reversed.*

Saunders & Stuart, and Mulvaney & Mulvaney, for appellant.

George Cosson, Attorney General, John Fletcher, Assistant Attorney General, and Thos. Guthrie, County Attorney for the State.

GAYNOR, J.—The defendant was indicted on the charge of murder in the first degree in the killing of one Edward Sterzing on March 25, 1911. The defendant having entered a plea of not guilty, the cause was tried and submitted to a jury, and the jury returned a verdict finding the defendant guilty of manslaughter.

The defendant interposed as defense that at the time of the killing of Edward Sterzing he was insane; that such insanity was superinduced by the long and continued use of intoxicating liquors, drugs, and narcotics.

There was no claim made by the defendant that he did not shoot and kill Edward Sterzing, and this element of the charge in the indictment was not controverted, but was conclusively established by the evidence.

The court submitted, with its instructions, the following special interrogatory: "Do you find that the defendant, H. D. Kelly, was insane on the 25th day of March, 1911, when it is charged that he shot and killed Edward Sterzing?" The jury answered, "Yes."

Upon the return of the verdict, the defendant moved for a judgment upon the special finding, notwithstanding the general verdict. This motion was overruled, and judgment pronounced on the general verdict.

There is no room for even a suggestion, such as is made by counsel for the state, "that the jury in determining the

guilt or innocence of the defendant were not limited to the 25th day of March, 1911, but could have found

1. **CRIMINAL
LAW: murder:
variance.**

the crime was committed at any date within the statutory period." It is urged that the charge in the indictment was not the test as to the time of the commission of the act, and therefore a finding that he was insane on the 25th day of March did not necessarily determine that he was insane at the time the shot was fired. The charge in the indictment was that the shot that killed Edward Sterzing, was fired by the defendant on the 25th day of March. All the evidence, without exception, supports the charge that the shot was fired at that time. We must therefore assume, in the consideration of this case, not only that he was charged with having shot Edward Sterzing on the 25th day of March, but also that the jury, following the evidence, so found.

The special interrogatory submitted to the jury, not only requests them to state whether or not he was insane on the 25th day of March, 1911, but reaches, in its inquiry the very time at which the shot was fired.

2. **SAME: special
finding: pre-
sumption.**

It is to be presumed that the court did not submit the interrogatory except for the information of the court upon the issue tendered, and for the purpose of enabling the court to know what the jury's finding was upon that issue. The insanity of the defendant at any other time was not material, and a finding as to that would not be helpful to the court in determining what its duty was to the state and to the defendant. The court had very explicitly and definitely defined to the jury that insanity, its character and degree, which relieves from criminal responsibility. The court had clearly differentiated between that and voluntary intoxication, and the jury were warned not to confuse insanity with intoxication. The court clearly and definitely directed the jury's attention to the difference between insanity and passion or revenge, and pointed out to them, in unmistakable terms, the difference between the criminality of an act when the act is the direct result or

offspring of insanity and where the act is the result or offspring of passion or revenge, and said to the jury, in language that could not be misunderstood, that passion or revenge, even though it had gained control of the person to such an extent that reason was driven from its seat, would not constitute such insanity as would excuse one in the commission of an act which otherwise would be criminal.

The interrogatory propounded by the court was submitted to the jury for the purpose of ascertaining from them what their finding was upon the defense interposed. This was evidently the purpose of the court in submitting the interrogatory. It was evidently submitted to the jury for the purpose of ascertaining from them a definite answer or finding upon this issue. The issue for the jury to determine, and to which this question was directed was: "Was the defendant insane at the time he shot Edward Sterzing?" The jury answered: "The defendant was insane at the time he shot Edward Sterzing." The plea was that he was then insane, and the evidence was offered to support this plea. It was a material issue, and one which the jury were required to pass upon and determine before they could reach a final conclusion upon the question of his guilt or innocence of the charge made against him. It would appear to the writer of this opinion that it should be assumed that the jury understood that the interrogatory called for a finding upon the issue of his insanity as involving the criminality of the act charged. It would not appear to the writer that the jury understood that the court was submitting to them an idle question, an answer to which, affirmative or negative, would not be determinative of the issue.

The court, in one of its instructions said to the jury, in substance, the defendant interposes as one of his pleas that he was insane at the time of the commission of the act charged against him, and the court said that such a plea, if proven, is a complete excuse for the crime charged, and each and every offense included therein, and this is true regardless of

what caused the insanity. "It is not necessary, in order to acquit, that the evidence on the subject of insanity satisfy you beyond a reasonable doubt that the defendant was insane. It is sufficient if, upon consideration of all the evidence, you are reasonably satisfied that he was then insane at the time of the commission of the act." This was the law of the case as it was given to the jury.

Upon what rational hypothesis the jury could have found, under the law as given to them by the court, and the evidence as submitted to them, that the defendant was insane at the

3. SAME: special
finding: gen-
eral verdict:
conflict: new
trial.

time that he committed the act charged against him, and yet was criminally responsible for the commission of the act, the writer of this opinion is unable to determine. It must be borne in mind that practically all the evidence was introduced on this issue. The question of defendant's criminality at every stage of the case was challenged upon this ground. A majority of the court, however, is of the opinion that neither the question nor the answer presented the matter to the jury so that it can be said therefrom that the jury affirmatively found that, though insane, his insanity had reached the point where he was legally excused from criminal responsibility for his act; that even though insane, he would not be excused if he was then able to control his acts if he desired to do so, and, even though insane, he would not be excused unless the act charged against him was the immediate offspring of such insanity; that the question propounded by the court, and answered by the jury, did not meet that instruction given by the court to the jury, in which the court said: "It should appear, not only that the accused was insane, but also that the act for which he was indicted was the direct offspring of such insanity."

The court, charging the jury upon the question of insanity, said:

The nature, character, and degree of insanity which

exonerates a person from criminal responsibility is not easily explained or understood. It is not necessary that it be shown by the evidence that the defendant, at the time of the commission of the act, if he did commit it, did not know right from wrong as to his acts in general. The inquiry must be directed to the act charged.

If you find from the evidence that the defendant shot and killed Edward Sterzing, and that the defendant's act in shooting Edward Sterzing was caused by mental disease or unsoundness, which dethroned his reason and judgment with respect to that act, which destroyed his power to rationally comprehend the nature and consequence of the act, and which, overpowering his will, inevitably forced him to its commission, then he is not, in law, guilty of any crime, and your verdict should be, 'Not guilty, on the ground of insanity.'

It is not necessary that it should be shown that the defendant was insane at all times, or for some particular or considerable length of time. It is sufficient to excuse him, if he was insane at the time of doing the act complained of, if such insanity caused said act; *but he would not be excused* if he was able at that particular time, to control his acts, had he desired to do so, even though he might have been, *in some degree, unsound mentally.*

In other words, it should appear not only that the mind of the accused was insane, but also that the act for which he was indicted was the direct offspring of such insanity. This being shown he ceases to be responsible for the act, *but not otherwise.*

In the event that you acquit the defendant, on the ground of insanity, the statute requires that you state that fact in your verdict.

From these instructions it is contended that the jury were told in effect, and properly so, that they might find that the defendant was insane in some degree, and still be accountable; that he could not be convicted unless he was insane to such a degree as to be not responsible, as defined in these instructions; that, the jury having these instructions before their minds, the presumption is that they followed them; that the answer to this special finding and the general verdict do not clearly show what the real purport and meaning

of the jury's answer is upon this question; what the finding of the jury was upon the ultimate question of criminality.

It is suggested that by their finding they determined that he was insane in some degree, but not affirmatively that his insanity had reached that degree which rendered him criminally irresponsible. The general verdict suggests that, though insane, his insanity had not reached that degree that rendered him irresponsible.

It is claimed that the purpose of the court in submitting the interrogatory was evidently intended to secure a finding from the jury of the defendant's insanity as affecting his responsibility for the crime, but the form of the interrogatory does not reach the full matter, and leaves the mind in doubt as to what the jury's finding was upon this issue. The question is not so much what the court intended by the interrogatory, as it is the intention and meaning of the jury as shown by their two findings.

The jury by their verdict may have found that he was guilty of having taken the life of Edward Sterzing, and by the answer to the special interrogatory found that he was insane, and therefore not criminally responsible. The jury found the defendant guilty of manslaughter. Manslaughter is the unlawful killing of a human being without malice or forethought. The killing of a human being, under the circumstances disclosed in this case, by one not insane, would unquestionably be not less than manslaughter.

The question as propounded to the jury, touching the insanity of the defendant, involved only his criminal responsibility for the act. It is therefore, in the judgment of the majority of this court, a question of doubt as to what the jury really found by their two verdicts touching the real issue upon which they were required to pass. This doubt ought to be, and is, resolved in favor of the defendant.

We think the court erred in pronouncing judgment upon the general verdict, and that the defendant's motion for a new trial should have been sustained. The case is therefore

reversed and remanded.—*Reversed and Remanded.* All the Justices concur.

PRESTON, J. (for himself).—As I understand the record, the interrogatory was given at the request of the defendant. The mistake of the trial court was in submitting it in the form in which it was given. If given at all, it should have been as to whether defendant was insane to such a degree as to absolve him from responsibility for the act. There is an apparent conflict between the general and the special verdict, though, for myself, I think they can be harmonized. The majority believe the best way out of the difficulty is to send the case back for another trial. Under the circumstances, I do not seriously object to this, though I am of opinion that the judgment could be properly affirmed for two reasons: First. The evidence was such that the jury could have found that defendant was sane and responsible, or insane and not accountable, or they could have found that he was insane to some extent, but that he was nevertheless responsible for his act in killing deceased. Some of his own witnesses testified that he was insane to some extent, but would not say that he was insane to the extent that he would not be accountable. Second. As between the two verdicts, the general verdict controls.

In civil cases, the provisions of the statute as to special findings and special verdicts are found in sections 3727, 3728, and 3778. Section 3728 provides that when the special finding is inconsistent with the general verdict, the former controls. The statute does not so provide in criminal cases (section 5405); but, in the absence of statute, such seems to be the rule. Clementson, *Special Verdicts*, 126. There is some difference between a special verdict and a special finding, which will not be now noticed.

Before the special finding shall control, it must be inconsistent with the general verdict, and so clearly so as that it cannot be reconciled with it. Every presumption is in

favor of the general verdict, and the special finding must be made to harmonize with it if it is possible to do so. Clementson, Special Verdicts, 131-134; *Bonham v. Ins. Co.*, 25 Iowa, 328; *Bills v. Ottumwa*, 35 Iowa, 110; *Mitchell v. Joyce*, 76 Iowa, 449; *Johnson v. Miller*, 82 Iowa, 693; *Morrow v. Bonebrake*, 84 Kan. 724 (115 Pac. 585, 34 L. R. A. (N. S.) 1147); *Wallenburg v. Railway*, 86 Neb. 642 (126 N. W. 289, 37 L. R. A. (N. S.) 135).

For the reasons before given, I think under the evidence the special verdict in this case can be harmonized with the general verdict. It is clear the jury did not intend to acquit on the ground of insanity, or on any other ground.

HICKMAN and WELLS, Appellees, v. ANNA McDONALD and J. A. BRADFORD, Appellants.

Contracts of infants: NECESSITIES: ATTORNEY'S SERVICES: SETTLEMENT OF SUIT. Assuming that the contract of a minor for legal services is a contract for necessities, within the meaning of the statute, the character of the obligation is not affected by the fact that the attorney also acts as agent in a settlement of the controversy. Thus the settlement of a suit for seduction, which was ratified both by the minor and her father as next friend, was a contract for necessities by which the minor was bound.

Same: ATTORNEY'S SERVICES: REASONABLE VALUE. Although a minor, as an abstract proposition, may only be liable for the reasonable value of an attorney's services, that fact will not relieve against a contract liability therefor, where the evidence shows that the reasonable value and the contract amount are the same.

Same: ATTORNEY'S LIEN: RECOVERY. Where attorneys were employed upon a contingent fee dependent upon the amount collected, and secured a settlement of the claim taking a note and mortgage as security payable to their client, but retained the possession thereof and claimed a lien thereon, a subsequent compromise settlement between the mortgagor and their client would not affect their right to recover on the security to the extent of their interest.

Same: ATTORNEY AND CLIENT: REPRESENTATION OF PARTIES WITH AD-
4 VERSE INTERESTS. Plaintiffs were employed to prosecute an action for seduction and obtained a settlement, taking a note and mortgage as security. Subsequently they brought suit to foreclose the mortgage and establish their lien for services, making their client and the mortgagor defendants. Their client answered pleading her minority at the time of the settlement, and that upon reaching majority she disaffirmed the contract and repudiated the settlement. The mortgagor pleaded the same facts and also fraud in obtaining the settlement, and that a subsequent settlement was made with the seduced girl. Both defenses were made solely in the interest of the mortgagor. *Held*, that the same attorneys ought not to have represented both the defendants, as their interests were adverse, and under the issues as made the court was powerless to protect the rights of the girl.

Appeal from Lucas District Court.—HON. C. W. VERMILLION,
Judge.

SATURDAY, FEBRUARY 14, 1914.

SURT in equity to establish a lien for attorneys' fees upon a certain note and mortgage executed by the defendant Bradford to the defendant Anna McDonald and to foreclose the mortgage to the extent of plaintiffs' interest therein. There was a decree for the plaintiffs, and defendants appeal.—*Affirmed.*

W. W. Bulman, for appellant.

Hickman & Wells, pro se.

EVANS, J.—The facts in this case are not materially in dispute. The plaintiffs are attorneys. In August, 1911, they were employed by the defendant Anna McDonald and by her father in her behalf to prosecute an action for seduction against the defendant Bradford. An agreement was entered into whereby they were to take a contingent fee and were to receive "one-half of whatever they may collect by suit or otherwise as they deem best. If they collect nothing, they

are to get nothing." At that time the defendant was confined to her bed in confinement and was a minor, and did not attain her majority until October following. A suit was begun in her behalf by her father as her next friend and by the plaintiffs as her attorneys. Defendant Bradford was supposed to be about to depart from the county. His only property consisted of one-sixth interest in eighty acres of land, worth about \$700. Having placed an original notice in the hands of the sheriff for service, one member of the firm went with the sheriff for the service thereof. He entered into a settlement with Bradford on behalf of his client for \$600 and took his note therefor payable to his client and secured by a mortgage on all of Bradford's property. The settlement thus obtained was immediately reported to the client and to her father. The defendant McDonald at this point denies that she approved the settlement. We are satisfied, however, from the evidence beyond a reasonable doubt that both she and her father did approve it heartily. On October 7th following, being the day upon which the defendant McDonald attained her majority, she served upon the plaintiffs a written notice of disaffirmance of her contract on the ground of her minority. By the same notice she repudiated also the contract of settlement entered into with Bradford on the ground that it was unauthorized. The note and mortgage being at all times in the possession of the plaintiffs, they brought this action to establish and enforce their lien thereon. Both defendants appeared thereto by the same attorney. They filed separate answers. The answer of the defendant McDonald pleaded her minority and her disaffirmance and her repudiation of the settlement as unauthorized. The answer of the defendant Bradford adopted that of his codefendant, and further pleaded that the settlement was obtained by false and fraudulent statements, and that he had since fully settled and compromised the claim with his co-defendant. It appears in the evidence that the defendant Anna McDonald had received from Bradford the sum of \$105 and

that she wanted no more. The defense of both defendants appears to have been made in the interest of Bradford alone.

I. Section 3189 of the Code provides: "A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided." The first question that naturally arises is whether legal service in such a case as here presented is a necessity within the meaning of the statute. The question is one which we have never passed upon in this state. For the purpose of this case the defendants' counsel concedes the legal proposition and concedes that legal service and advice in a seduction case is a necessity within the meaning of the statute. Accepting this concession as sufficient for our present purposes, we need not pass upon the question further than to note that the concession made is in accord with the holding in many other jurisdictions. *Munson v. Washband*, 31 Conn. 303 (83 Am. Dec. 151); *Epperson v. Nugent*, 57 Miss. 45 (34 Am. Rep. 434); *Anding v. Levy*, 57 Miss. 55 (34 Am. Rep. 435); *Barker v. Hibbard*, 54 N. H. 539 (20 Am. Rep. 160); *Crafts v. Carr*, 24 R. I. 397 (53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721). It is the contention of appellant, however, that this attribute of necessity cannot apply to a mere contract of agency, and that the plaintiffs acted as agents only, and not as attorneys, in making the settlement with Bradford. That the plaintiffs acted as agents is doubtless true, but they were agents in the sense that all attorneys are agents for their clients within the scope of their authority. An attorney is necessarily an agent. Agency inheres in his relation to his client. The plaintiffs were not divested of their character as attorneys, nor did they terminate their relationship as such, by

1. CONTRACTS OF
INFANTS:
necessities:
attorney's serv-
ices: settle-
ment of suit.

reason of their attempt to accomplish a settlement. Granted that they could not compromise their client's claim without express authority, they were bound nevertheless to serve the interest of their client to the best of their ability, even to recommending a settlement, whether authorized to make it or not. If they made a settlement in excess of their authority, the election rested with the client whether to repudiate or to ratify. As already indicated, the settlement in this case was ratified both by the minor and by her father as next friend, and this disposes of the claim made in appellants' argument that the contract of settlement was repudiated as being unauthorized.

II. It is urged that, even though the minor was bound for the services of her attorneys as for necessities, she was bound only for the reasonable value of such services, regard-

less of any contract for a larger amount. As an abstract proposition, there is much to be said in support of this contention. In this case, however, the undisputed evidence shows the reasonable value of the services to be the same amount as that determined by the contract. This state of the record, being conceded by appellants, leaves nothing to argue on the abstract proposition.

III. It is urged on behalf of appellant Bradford that the agreement between the plaintiffs and their client could not be binding upon him and that he could not thereby be

precluded from maintaining his defenses to the notes and mortgage. This contention may also be conceded, but it avails little to such

appellant. No evidence was offered in support of the defense of fraud. The notes and mortgage were therefore valid as against him. The defense of payment is proved to the extent of \$105. Whether such payment could be deemed a compromise in a legal sense is a different question. It does not appear from the evidence that there was any infirmity in the paper or that there was any dispute concerning the same

2. SAME: attorney's services: reasonable value.

3. SAME: attorney's lien: recovery.

between the two defendants. All that appears is that she voluntarily relinquished her rights against him because of her affection for him. Having reached her majority, it was doubtless competent for her to waive her rights and to accept less than her due. But the plaintiffs had a lien upon the paper in their possession and this could not be defeated through any mere surrender by the client. So far therefore as it was in the power of Anna McDonald to surrender the notes and mortgage to the defendant Bradford, he has obtained the benefit of such surrender. The trial court awarded a decree against him, only for the amount due the plaintiffs, and not for the amount which would otherwise be due to Anna McDonald.

IV. The position of Anna McDonald in this case is unique and unusual and ought not to pass unobserved by us. An answer was filed in her behalf which serves no function

4. **SAME:** attorney and client: representation of parties with adverse interests. beneficial to her. Such answer serves no interest except that of Bradford. She testified to her affection for him and that she expected to marry him. This was the reason for her sur-

render of her rights and it was not discreditable to her. The trial herein was had more than one year after she had attained her majority. The plans for the marriage were still open and without date. The stipulation of settlement between her and Bradford is in the record before us. Its terms afford no protection to her. They were drawn in the interest of Bradford alone. Perhaps this statement is too sweeping. Bradford does agree therein to pay her doctor's bill and nurse hire and to pay her for three months' loss of time at \$3 per week and an estimated doctor's bill for future attendance in the sum of \$35. This was entered into on the day the young mother attained her majority. The expected marriage, the manifestly controlling consideration for her surrender of her rights under the mortgage, is not mentioned therein. Older heads than hers will shake with suspicion that she has been

twice deceived and that her codefendant has used her affection for his own protection alone.

Under the circumstances shown, we think that the same attorney ought not to have represented both of these parties in this litigation either in the lower court or here.

Under the issues as made, the allegations of the answer of the defendant McDonald were more hostile to her interest than were the allegations of the petition. The court therefore has had no opportunity to protect her rights. The costs of this case will be taxed to the defendant Bradford, alone.—*Affirmed.*

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

EVA I. KINKADE, Appellant, v. JOHN P. KINKADE, Appellee.

Divorce: CRUEL AND INHUMAN TREATMENT: EVIDENCE. In this action for divorce on the ground of cruel and inhuman treatment the evidence of defendant's misconduct toward, and ill treatment of plaintiff, was not sufficient to show that her life was imperiled within the contemplation of the statute.

Appeal from Humboldt District Court.—HON. D. F. COYLE, Judge.

SATURDAY, FEBRUARY 14, 1914.

ACTION by plaintiff for divorce and \$12,000 alimony. Plaintiff charged cruelty. After full trial plaintiff's petition was dismissed, and she appeals.—*Affirmed.*

Healy & Healy and *F. S. Lovrien*, for appellant.

Kelleher & O'Connor and *L. W. Housel*, for appellee.

.. PRESTON, J.—This husband and wife were not congenial. If the statute made that a ground for divorce, they would be entitled to relief, perhaps, though one is as much to blame as the other, if indeed plaintiff did not herself provoke and bring on a part of the trouble. In the later years they did not try to get along or to control themselves and fairly discuss their difficulties, but, as is often the case under such circumstances, each appears to have at times tried to be hateful towards the other. We have thoroughly examined the large record, and concluded that plaintiff has not established that her life has been imperiled by the conduct of the defendant.

At the time of the trial Mrs. Kinkade was forty-five years of age and defendant forty-two. When they were married, in 1891, plaintiff was twenty-five years of age. Prior to their marriage she had taught school and boarded in the family of defendant. Defendant has always been a farmer. There are two children, a son, Ray, nineteen years of age, a daughter, May, sixteen at the time of the trial. The plaintiff and defendant started in life with substantially nothing. Defendant now owns one hundred and sixty acres of land, upon which there is a mortgage of \$1,300, an undivided half interest in another one hundred and sixty-acre farm, incumbered to the amount of \$4,800, a residence property in Humboldt, valued at about \$2,000, and some personal property. The net value of the estate is about \$17,000, as claimed by defendant, to \$25,000, as claimed by plaintiff. The value of the land has increased materially since it was purchased. They worked hard to accumulate this property over which they are now quarreling. They were both industrious and very economical and saving. Defendant has never been a drinking man and had no expensive habits. Plaintiff was a good woman, and did her part as a helpmeet for her husband in making and saving money, at least up to the time they left the farm. She now complains that during the years they were on the farm he did not properly provide for her. But she made no complaint of this at the time, and we are satisfied from the record that she was as close in

money matters as defendant, if, indeed, not more so, until after they had moved to town. She would have been satisfied with a less expensive house than the one they finally purchased. He tells of his buying a rug and clothing of better quality and higher price than she expected or intended. This is not disputed. They occasionally had crop failures, and times were hard during part of the time. As one witness puts it: "While I was in that home they always got along while I was there as far as I know. We always had enough to eat. They always had enough to wear; all of them did. Of course, I know it was pretty hard times, those times. I don't know just what years those were. I think it was right around when Bryan was going around." Up to the time they moved to Humboldt, about the year 1907, the children were dutiful and the son was a good worker. They all worked hard. In fact plaintiff and defendant overworked. Neither one appears to have been in rugged health. Defendant had curvature of the spine, hemorrhoids, and kidney trouble. Plaintiff at one time had diabetes and some other ailments. At the suggestion of defendant they retired and moved to Humboldt. Up to the year 1909 or 1910 there was more or less fault-finding by each, and there were occasional differences.

Plaintiff complains of a transaction about 1895, when she claims defendant grabbed her by the shoulder and threw her to the floor. She is not corroborated as to this. Defendant denies it, and says she stumbled over a chair. There is no merit in the claim of plaintiff that defendant did not provide medical attention and care when she was sick. She claims he at one time, when they lived on the farm, whipped a horse severely. This is denied by defendant, and there is other evidence, outside that of the parties, tending to show that he is a good horseman and was kind to his stock. She also testifies to his beating a dog early in their married life. He admits he lost his temper in this transaction, but says the dog would not mind; had been worrying the stock, and at the time of the transaction had bitten his hand until it bled. She also

says he whipped the little girl when she was about five years old; says he struck her with a large whip, but she admits she was not present and did not see the transaction. He swears the child would not mind, and he used a toy whip of the son's. The child needed correction in a proper manner. He says, and it is not disputed, that this is the only time in his life he ever laid hands on her until she was 15 or 16 years old. Two other transactions, when he punished, or attempted to punish, the girl will be referred to later. Plaintiff seems not to have complained of the whipping of the girl at the time of the transaction. As indicating the attitude of plaintiff towards the defendant in these matters, the following from her testimony may be quoted: "As between my husband and my son, I have always sympathized with the son; as between my husband and my daughter, I have always sympathized with the daughter; as between my husband and the dogs, I have always sympathized with the dogs; as between my husband and the horses, I have always sympathized with the horses, in the cruelty part of it."

After their marriage they became church members, and had some differences over religious matters. She claims she gave up teaching Sunday school because of something he said, while he claims that she and the children sneered at him when he was saying grace at the table, so that he gave that up. She says he called her a sneak and a devil. Defendant admits that he told her she sneaked the son off to a field meet at another town and gave him the money, after defendant had refused to do so. On the other hand, there is evidence, and the trial court could have found, that at one time plaintiff called defendant a dirty son of a b——; at another time called him a pup; that she neglected him when he was seriously ill, and before he was taken to the hospital for an operation, and that she said it was put on, or a put-up job. As to the matter last mentioned, there is no dispute. It is to her credit that on the morning he was taken to the hospital, when she learned he was seriously ill, she went to him and told him she was

sorry she had said what she did, and was sorry she had not cared for him. This tends to show she still had some regard for him, although she testified that she had lost all her love for him and was done with him. As a witness, defendant says he still loves her. He generously excuses the children for their mistreatment of him, claiming that plaintiff had turned them against him. At another time she took the children to another state for several weeks, without consulting defendant, and did not let him know when they would return. When defendant would direct the son to do chores, or other work, he, the son, would go to the plaintiff to see whether he should obey. The son at one time, in the presence of the mother, and without correction, called the father a vile name. At another time the son, in a conversation with another witness, called the father the same name, and said his father might come to want some time, and if he did, he, the son, would not help him. At another time the son threatened to assault his father. In a letter written by plaintiff, she referred to a transaction in which she claimed the son had "flopped" his father.

There are many other circumstances for and against each party. That it is impracticable to refer to all of them will be apparent when we say that it requires 275 pages of the abstracts for the evidence of the two parties alone.

The daughter testified in corroboration of the mother in a few only of the matters complained of. The son did not testify for either. As to many of the transactions testified to there is no corroboration. The parties corroborate each other at some points, others are explained, and as to some there is a flat contradiction.

In 1909 there was a controversy about subscribing for a newspaper, in which plaintiff informed defendant, in effect, that she should do as she pleased in the matter. In the same year defendant punished the daughter for an insolent remark. As to this transaction, plaintiff says defendant struck the girl in the face with a paper rolled up, or a magazine, while defendant claims that it was an envelope in which he had re-

ceived an insurance policy. It appears that the daughter had started a letter and accused the father of trying to read it. She told her father what she was writing was none of his business, and then kicked him in the shins. At another time, when defendant had received a telegram from a sick relative and was about to take an early morning train, he asked his wife about a handkerchief, and the daughter said to him to shut up and go on. A few of the circumstances before enumerated occurred after March, 1910, but for the most part they show the situation and history of the case in a general way up to that time. At about that time she made, or caused to be made, a list of all the property, including the stock and crops on the farm, and consulted an attorney in regard to divorce and division of the property. She was advised by the attorney that she did not have sufficient evidence to justify suit, but that, defendant having gone so far, to wait, and he might go further. There was no attempt on her part for a settlement of their differences by a reconciliation. She informed the children of the result of the consultation with the attorney. Defendant claims that after this there was a change in the atmosphere of the home. At about this time, or soon after, plaintiff wrote to defendant's mother two long letters, giving her side of the controversy. In these she does not refer to the matters she now relies upon as grounds for divorce. In one of these letters she uses these words: "If he comes up and settles like a man, things will be all right, and if he don't, I shall make him smoke for all I can."

As we understand the record, defendant was in the hospital at the time this letter was written. He obtained the letter during the summer or fall of 1910. The matter most seriously complained about in the letters was a business transaction with one Briner. Briner was a cousin of defendant. Defendant had signed notes with Briner as surety, totaling about \$1,700, prior to 1910, and had taken a chattel mortgage as security. Briner had a sale of his personal property, and defendant sought to enforce his lien. There was a lawsuit,

and defendant was successful in the main, though he admits he lost about \$185, but obtained judgment against Briner for that amount. That suit was not tried until after the present action was begun. This matter was the subject of discussion between plaintiff and her husband; she criticised him for signing the notes, claimed that he was losing their money, and claimed that he was fraudulently protecting Briner from other creditors. Whenever anything came up she would mention the Briner matter. Defendant says plaintiff would not await the final outcome of the Briner affair, but concluded that defendant had lost his money. Defendant admits he made a mistake in signing the notes, and that he so told his wife. He testifies: "I told her that I had done wrong—I knew it—but I told her we all made mistakes, and I said it had not done Briner any good, all I had done for him, and I said, 'It has really done him harm;' and I says, 'It has not done me any good.' But, I says, 'It is too late now; we have got to make the best of it, and we have got to get out of this just the best way we can.' I told her I was sorry I had trusted him."

After plaintiff consulted the attorney, and after the writing of the letter above referred to, there was some friction about a pair of shoes and coats for plaintiff and daughter. Defendant advised a different kind of shoes for the girl than she wanted. Two coats were obtained, one for Mrs. Kinkade and one for the daughter, and they were paid for by the defendant, except \$4, which was paid by plaintiff. She had not asked defendant to get the coats. She admits she had unlimited credit at the stores at that time, and she admits signing defendant's name to checks without objection on his part. Plaintiff worked out a part of the time after moving to Humboldt, but defendant had not asked her to do so, but, on the contrary, he had said she was not able to, and ought not to do so.

After the letter to defendant's mother, plaintiff bought two bills of furniture, amounting to about \$85, without con-

sulting defendant. She says she knew he would not consent, and that is the reason she did not consult him. He does not contend they were improper purchases, and he paid for the goods. He complains that he did not know what she was going to do. After the letter, and after some of these transactions, defendant consulted an attorney, who advised him to notify merchants to not extend credit. This he did personally, but with one merchant, who kept a general store, he arranged that they could get on his account whatever they needed in dry goods, groceries, etc. Defendant testified he told his wife of this arrangement, and that the reason for it was because he did not know what she was going to do next. Defendant testifies that he talked with his wife an hour or more that evening and told her that the trouble ought to be forgotten. He says they apparently had it all settled until they came to the Briner matter, then she said she would not listen to him any longer and got up and went into the house, and the daughter told him to shut his mouth; that she had heard enough of that. There are some other circumstances shown in the evidence tending to show that plaintiff had made up her mind to do as she pleased in these matters, and that plaintiff and the children were inclined to relieve defendant of the responsibility of acting as head of the family and in the management of his property.

The final chapter in this most unfortunate affair occurred in November, 1910, a few days before this suit was brought. At this time the daughter appears to have developed into a young woman. The evidence is she weighed 105 pounds two years before, when she was 14 years of age. Defendant had been husking corn, and was cleaning himself up in the kitchen. The daughter, May, had gone through the door several times and slammed it. Defendant spoke to her about it. They all agree that May then said: "Is this a private door?" Defendant testifies she also said: "It is none of your business." He went into the dining room and obtained a razor strap. He did not strike the daughter with it, but admits he tried to do

so. The mother interfered. There is a dispute as to just what occurred after that, but it seems plaintiff had a stove poker; defendant says plaintiff and May each had a poker, and one of them a broom stick. May kicked the swill pail over, spilling the contents on the floor, and during the mêlée some of them got down in it. Defendant denies striking his wife at all, but she says that in attempting to strike the girl he struck her. She also testifies in regard to this matter as follows: "Q. The defendant's striking you, Mrs. Kinkade, was wholly unintentional, was it not? A. I couldn't say as to that. Q. You knew that it was not—you knew the only reason you were being harmed was because you were interfering? A. Certainly. Q. He never laid his hand on you in his life, with the exception of the first time that you spoke of here, back in 1895, until that time, had he? A. No, sir. Q. And you knew that the reason why he laid his hands on you that night was because you interfered with his attempt to chastise the girl? A. Yes, sir. Q. And you knew that if you hadn't interfered, he would not have touched you? A. Why I didn't know it, but I didn't think he would. Q. You knew John Kinkade well enough to know and to think that he would not have touched you if you didn't interfere in his treatment of the girl? A. Well, I don't think he would, no."

This is not a case where a drunken or brutal husband has beaten an inoffensive, faithful wife. Defendant is not without fault, but, as before indicated, the plaintiff is not blameless. We have set out enough of the evidence to show this. The children have not treated their father with proper respect, nor has he used good judgment and proper control over himself in his relations with them. Many of the acts between plaintiff and defendant are trivial, and should have been overlooked and forgotten. Others are more serious, yet we are satisfied some of them have been magnified. The best thing for these parties to do is to forgive and forget; begin over again. It is the duty of defendant to support his wife and children according to his means and income, and they

ought to live within that and conserve their property. Plaintiff has now arrived at that time in her life when she will undergo a physical and mental change. It is the duty of defendant to treat her with kindness and consideration, and she should, of course, do her duty by her husband.

Such cruel and inhuman treatment as the statute contemplates has not been made out, and the judgment of the trial court is *Affirmed*.

LADD, C. J., and EVANS and WEAVER, JJ., concur.

CHAS. H. KINKEAD, Appellant, v. R. M. PEET and HENRY BENNETT and HENRY RICKEL, Interveners, Appellees.

Judgments: ERROR IN COMPUTATION ON FORMER APPEAL: EFFECT. A
1 mere typographical error in computation, manifest on the face of
the figures, and appearing in the opinion of the appellate court,
is not binding upon the trial court in further proceedings after
reversal.

Payments: APPLICATION. The rule that the debtor has the right to
2 control the application of payments where several obligations exist
is only applicable where the payments are voluntary. Where the
credits arise out of certain security the creditor is entitled to them
as a matter of right and may apply them in the order of the liens.

Appeal: DISMISSAL. Where two appellants dismissed their appeal after
3 it had been perfected, they were not entitled to a dismissal as to
the remaining appellant because of his failure to serve notice of
appeal on them thus making them appellees.

Attorney and client: RECOVERY BY ATTORNEY IN SAME ACTION. Ordi-
4 narily an attorney cannot obtain an adjudication in his own favor
against his client, while representing his client in the same action,
whether other attorneys are associated with him or not.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

SATURDAY, FEBRUARY 14, 1914.

THIS case was before us upon two former appeals. The opinion in the last appeal will be found in 153 Iowa, 199. Upon such appeal the case was reversed and remanded for a further hearing and accounting, after a finding by us that the allowances made by the district court to appellee were excessive. Such former allowances amounted to a net sum of \$24,427. The case being remanded, a further hearing was had in the district court. A new computation and accounting in accord with our former opinion reduced the net sum in favor of plaintiff to the extent of about \$4,000; the decree fixing the net amount due him at \$20,453. From such finding, the plaintiff has again appealed.—*Modified and Affirmed.*

Remley & Calkins, for appellant.

Jamison & Smyth, for appellee.

J. H. Preston and Rickel & Dennis, for interveners.

PER CURIAM.—There are a large number of motions and amendments and resistances and replies submitted to us which relate to the sufficiency of the appeal. We will deal with these in a subsequent paragraph. We see no impediment in the way of a consideration of the appeal in the main case. We proceed, first, therefore, to a consideration of the merits of the case as presented by the appeal. By an appropriate order of this court, the abstract on the former appeals is made a part of the record on this appeal. The abstract proper, therefore, which is filed herein, covers only the proceedings had in the district court on the last hearing and must be considered in connection with the previous abstract.

I. The first complaint is that the trial court included in the computation a \$1,700 note which was secured by the second mortgage. The contention is that this was barred by

our former opinion. This contention is based upon the argument that our former opinion fixed the amount due on the mortgages and that this note was not included. We think the contention is not warranted. We made no finding as to amounts. We did recite certain concessions made by the appellant. Paragraph 7 of the opinion laid down the rule or method which should govern the district court in the final computation. The amount of no item was specified. The \$1,700 note was an undisputed item. It was not specifically referred to in the opinion, as many other items were not. The appellant offered no testimony either at the last hearing or at any previous hearing impeaching the note as an item of his indebtedness. We think, therefore, that the note was properly included in the computation.

II. It is next urged that the trial court erred to the extent of \$100 in a certain item of credit due to the appellant for hogs sold by the appellee. The trial court allowed such credit in the amount of \$1,432. It is urged

1. JUDGMENTS :
error in com-
putation on
former appeal :
effect.

that our former holding fixed the item at \$1,532. This contention is based upon the following statement in the opinion: "Defendant concedes that he sold a part of the hogs for \$1,359.14, and made use of certain others, which the evidence shows were worth about \$75, and as this was done before defendant denied the mortgage character of the transfer of property, and the parties seem to have treated the delivery of the hogs as a payment upon the debt secured by such transfer, it will be so treated here and applied as a payment at that date of \$1,532." It will be noted that the two items of \$1,359 and \$75 were footed in the addition as \$1,532 instead of \$1,434. This was a mere typographical error and was manifest as such on the face of the figures. The trial court properly included the two specific items and ignored the erroneous footing.

III. The appellant demanded that the credits found in his favor should be applied upon certain specific notes. This

demand was based upon the theory that the debtor has the absolute right to control the application of payments where several obligations are outstanding. The rule thus contended for has no application to the case. It applies only to voluntary payments. *Wyland v. Griffith*, 96 Iowa, 28; *Bank of Defiance v. Ryan*, 144 Iowa, 725. The credits involved herein all arose out of the security. The appellee was entitled to them, as a matter of right, by virtue of the security and was entitled to apply them in the order of the liens.

IV. It is lastly urged that the trial court erred in the matter of the taxation of costs. This contention rests upon a rather indefinite record. In the first instance, the decree of the trial court made no provision for costs. A motion to modify the decree filed by appellant Kinkead contained the following as paragraph 7: “(7) That the court erred in refusing to tax the entire cost of this suit to the defendant, Peet, in accordance with the order made by the opinion filed in the above cause of Charles H. Kinkead v. R. M. Peet.” Thereupon the trial court “sustained” paragraph 7 and directed the clerk “to tax all the costs in this hearing, amounting to \$9.60, and the costs of the transcript on the last appeal, amounting to \$300, to the defendant Peet. Both parties except.” In other respects the motion was overruled. This is the entire record before us. It is urged in argument that the court ought to have taxed the costs of previous trials. The record does not disclose what orders have been made in reference to costs of previous trials, nor what costs have been made in such trials.

V. We have already referred to the multitude of motions which have been filed in this case. Were it not for such motions, the case and the appeal, as we have already stated them, would seem very simple. From these motions, it appears that there is serious friction between appellant Kinkead and his attorney Mr. Rickel over the fruits of the litigation. There was originally an

3. APPEAL: dismissal.

agreement between them for a division on a per cent. basis. The land was conveyed to Henry Bennett, as trustee. Bennett, as trustee, intervened in the action. This was done for the purpose of protecting Rickel. There appears to have been an attempt to adjudicate the respective rights of attorney and client in this suit. After the decree Rickel served a notice of appeal on behalf of the plaintiff Kinkead and the intervener Bennett. In such appeal he also named himself as intervener. He was not in fact a nominal party to the case. Later Bennett and Rickel purported to dismiss the appeal on their part. They have filed a motion here to dismiss Kinkead's appeal because he served no notice upon them. Their contention is that when they dismissed their appeal they were no longer in this court, and it devolved upon Kinkead to serve a notice of appeal upon them in order to be heard on his own appeal. The contention has no merit. The appeal having been perfected (and therefore being perfect) when it was taken, it would not become otherwise as to Kinkead by the mere withdrawal of the intervener.

Proceedings have been had since the decree, and these have been laid before us by additional abstracts. Bennett has redeemed from Peet and has sold the land as trustee, much of which, and perhaps all, has been done against the protest of Kinkead. These matters have no place in this appeal. They are matters in which the appellee Peet has no interest. The fact that the judgment in his favor has been paid would of itself entitle him to a dismissal of the appeal on motion. But he has not asked it. A brief of 54 pages has been filed which purports to be on behalf "of interveners and appellees." The brief deals wholly with the controversy between the appellant and his attorney. It is professedly prepared by the same attorney who served the notice of appeal in the first instance. It states that the attorneys for the appellees have authorized the use of their names to be appended thereto. The appellee himself has not otherwise been remembered therein. We find no word in it which purports

to be in his behalf. A bitter controversy has been made here between the attorneys as to whether Remley & Calkins appeared in the court below for the appellant together with Rickel & Dennis. By many affidavits, one affirms and the other denies. The language used by these veteran counsel in their characterization of each other is unworthy of their long and honorable career before this court. Whether Remley & Calkins appeared or not, it is undisputed that Rickel & Dennis also continued to represent their client in the litigation.

It ought to be needless to say that an attorney cannot ordinarily obtain an adjudication in his own favor of a controversy as between him and his client while representing his

client as his attorney in the same action; and
 4. ATTORNEY AND CLIENT: recovery by attorney in same action. this is so regardless of whether other attorneys may be associated with him or not. In

the present case, the issues framed were those between the plaintiff and the defendant. The defendant had no interest in the controversy between the plaintiff and his attorney. Such controversy, if any, was outside the real issues of the case.

In so far as the decree entered in this case may appear to adjudicate any controversy between the appellant and his attorney over the fruits of the litigation, it will be modified so as to reserve such controversy from the adjudication, leaving all such questions open to be determined in an appropriate action between such parties themselves. The motions referred to will all be overruled. No printing will be taxed for the appellee.

With the modification above stated, the decree of the district court will be affirmed.—*Modified and Affirmed.*

LADD, C. J., and WEAVER, EVANS and PRESTON, JJ., concur.

LUKAS ZAHARYAS, Appellee, v. THE CHICAGO, ROCK ISLAND
& PACIFIC RAILWAY COMPANY, Appellant.

Compromise and settlement: FRAUD: EVIDENCE. In this action to
1 abate as a nuisance the diversion of surface water in such manner
as to wash dirt from an embankment and cause it to spread over
plaintiff's land, to which defendant pleaded a settlement of all
damages accruing, and plaintiff contended that his signature to
the written settlement was obtained by fraud, the evidence is re-
viewed and held insufficient to show fraud.

Same: FRAUD: UNREASONABLENESS OF SETTLEMENT. Where it ap-
2 peared that plaintiff's land consisting of twenty-four acres was of
the value of \$60.00 per acre, two acres of which was covered with
clay washed by heavy rains from defendant's embankment, and
that the amount of land thus covered at the time of the claimed
settlement for damage thus caused was the same as at the com-
mencement of this action, a prior settlement with plaintiff for all
damages, past, present and prospective, in the sum of \$250.00 was
not so unreasonable as to constitute a circumstance in support of
the claim of fraud in procuring the settlement.

*Appeal from Jefferson District Court.—HON. C. W. VER-
MILION, Judge.*

SATURDAY, FEBRUARY 14, 1914.

ACTION at law to abate a nuisance; the nuisance consist-
ing in the diversion of surface water. There was a verdict
for the plaintiff and a judgment and order of abatement en-
tered thereon. The defendant appeals.—*Reversed.*

*F. W. Sargent, J. H. Johnson, and J. P. Starr, for ap-
pellant.*

A. G. Jordan and E. F. Simmons, for appellee.

EVANS, J.—The plaintiff is and was the owner of twenty-four acres of land, being a part of a government subdivision of forty acres. This forty-acre tract is traversed by two rights of way of the defendant railway company, known in the record as the “old” right of way and the “new” right of way. The old right of way traverses the forty-acre tract diagonally in a northwesterly and southeasterly direction. The new right of way traverses the same diagonally in a northeasterly and southwesterly direction. Between these two rights of way, and south of the point of intersection, lies the plaintiff’s twenty-four-acre tract, triangular in shape. That is to say, its base line rests upon the south line of the forty-acre subdivision; the tract extending north and coming to an apex at the point of intersection of the two rights of way. Walnut creek runs easterly through plaintiff’s tract, dividing it into approximately equal parts. The defendant railway company acquired its new right of way in 1900 and constructed its roadbed thereon, in the form of a high embankment, in 1901 and 1902. After the acquisition of its right of way by the defendant, the plaintiff in 1901 purchased his twenty-four-acre tract. The plaintiff’s land is low and flat and is subject to overflow from Walnut creek in times of heavy rain. The embankment of the defendant is fifty feet high at Walnut creek and diminishes in height as it extends to the high ground in either direction. The embankment consists of sand, gravel, cinders, and clay. At the time of its construction, its base extended to the full width of the right of way. After its construction, it settled and slipped more or less, and the rains carried clay from its sides to its base and upon the contiguous land of the plaintiff. The plaintiff commenced this action December 2, 1911. He claimed damages for washings and overflow from the defendant’s embankment for the years 1907, 1908, 1909, 1910, and 1911, and prayed for an abatement of the nuisance. The defendant pleaded a general denial, and pleaded further a full settlement and satisfaction between plaintiff and defendant on Decem-

ber 11, 1906; the settlement being in writing. The plaintiff in reply pleaded that his signature to the written settlement pleaded by the defendant was obtained by false and fraudulent representations as to its contents, and that the plaintiff was deceived thereby; he being unable to read or write the English language. The trial court instructed the jury that the written settlement in question was a complete bar to plaintiff's action, unless the allegations of fraud in its obtaining were sustained. There was a verdict for the plaintiff for \$48 and an order abating the nuisance and enjoining the defendant from permitting water from its right of way to run upon the plaintiff's land.

The principal question presented to us is whether there was sufficient evidence of fraud in the making of the settle-

1. COMPROMISE
AND SETTLE-
MENT: fraud:
evidence.

ment with plaintiff to sustain the verdict of the jury in that regard. The claim is that, being himself unable to read the English lan-

guage, he was deceived by the defendant's agents as to the contents of the contract of settlement.

The plaintiff was born in Germany. His native language is Polish. He came to this country at the age of twenty-two, and has lived in his present neighborhood for thirty years. He has bought and sold land to some extent. He is a farmer, and for more than twenty years has owned his farm and has transacted all the business incident to its management. His examination as a witness discloses that he speaks English readily, though not perfectly, in a grammatical sense. In the settlement of December 11, 1906, the defendant was represented by one Mulligan. In order to impart an intelligent understanding of the evidence in relation thereto, a little previous history must be stated.

In May, 1906, one Palmer had represented the defendant in negotiations with the plaintiff looking to a settlement of all claims made by him at that time. Palmer being without authority to promise any ditches, the following written proposal was signed by the plaintiff and taken by Palmer:

\$180.00. 16th day of May, 1906. Ditches. This certifies that if the Chicago, Rock Island & Pacific Railway Co. will pay me by voucher through the post office at Pleasant Plain, Ia., R. R. No. 1, within a reasonable time the sum of one hundred and eighty and 00/100 I hereby agree to accept the said sum in full settlement and satisfaction of all claims, of whatever kind and description, arising from or growing out of all damages by reason of damages by overflow and damage to my land by rails, ties and débris, railroad to put in a ditch on its right of way both sides of Walnut creek. This agreement subject to approval by the claims attorney or claim agent of said company. Lukas Zaharyas.

In presence of Adam Peck, Jas. S. Palmer.

At the time of the construction of the embankment, a side track had been laid by the construction company on the land of the plaintiff by arrangement with him, and considerable débris had been thrown and left upon the plaintiff's ground as an incident to the use of such side track. This will explain some of the terms of the above proposal. Subsequent to May 16th considerable correspondence was had on the subject between the defendant and the plaintiff's attorney. On December 11th Mulligan came to the home of the plaintiff and effected a settlement for the sum of \$250 as damages and the further sum of \$50 as the purchase price of fifteen-foot strip of land abutting on the right of way. Two instruments were drawn, one purporting to convey the fifteen-foot strip and the other purporting to be full settlement of all claims for damages, "past, present, and prospective of whatever kind," sustained by reason of the embankment referred to and sustained by reason of the overflow on plaintiff's land. For want of access to a notary public, these papers were not signed on that day. Mulligan was unable to remain until the next day. He therefore paid the plaintiff the full sum of \$300 with the understanding that the plaintiff and his wife would go to Brighton on the following day and execute and acknowledge the papers before a notary public. Mulligan left the papers with the plaintiff or with one Case and departed.

On the following day the plaintiff and his wife went to Brighton and in company with Case appeared before Ed Deeds, a notary public, and there duly executed and acknowledged both instruments. Shortly thereafter both were duly filed.

On the question of fraud, the following is the testimony of the plaintiff as to what was done by Mulligan:

When I signed the two instruments, Exhibit D2 and Exhibit D3, a railroad agent came from Chicago to my house. That was in 1906, in December some time. Q. Now what did he say to you when he came down there to your house at that time? A. He says he came down to pay me that damage what I settled up with Palmer and that \$50 for the switch, and says, says he, I got to sign a receipt for that what he pay me. Q. Did he say anything else? A. He says he wants a fifteen-foot strip to cut a ditch. Q. What else did he say? A. He want me, hire me to cut the ditch. Q. Did you tell him what you wanted for that fifteen-foot strip? A. Yes, sir. Q. How much did you tell him? A. I told him a hundred dollars. Q. What did he say to that? A. He says too much. Q. What did you say? A. I says that ain't too much, cut the line, the line been straight, and he buy a piece and cut up and spoil the line, the fence line. Q. And do you remember what he said relative to how much money he would pay you? A. Well, he didn't say how much, but \$180 and \$50 for the switch, and he buy more land. Q. What was he to pay you altogether? A. \$300. Q. What else did he say? A. He don't want to pay me a hundred dollars for that fifteen-foot strip. Q. What else did he say? A. After he buy that he says he going to cut the ditch. He want to hire me to cut the ditch. He told me to see Mr. Case, and get him to cut the ditch. Mr. Case was superintendent of the cut-off. Some called him an engineer. Q. What else did he say about signing these papers? A. Well, he says we go to Pleasant Plain. Q. What did he say those papers were, if anything? A. He says—what for, to sign? Q. What was the receipt for? A. To pay for the damage and that \$50. Q. What did he say about Mr. Palmer? A. He said he was going to pay that damage I settled up with Palmer.

After the negotiations had been concluded with the plaintiff on December 11th, one Frank Pacha, a mortgagee of plaintiff's land, signed a mortgage release of the fifteen-foot strip of his land. In that connection plaintiff testified as follows:

Q. Did you ask Mr. Pacha—can Mr. Pacha talk Polish?
A. Yes. Q. Did you ask him any question in Polish? A. After we came out of the post office I ask him if he pay me this damage to this time. Q. Who did you ask that question to?
A. I asked it to Mr. Pacha. Q. What did you ask Mr. Pacha, then, after you went out of the post office there to ask this man that had these instruments? A. I asked him, that man, pay me that damage to this time. Q. Did Mr. Pacha ask him that in English? A. I ask Polish and he talk English to the other man. Q. To the man that had these instruments 2 and 3?
A. Yes, sir. Q. What did that man say? A. He says, 'Yes.'

The foregoing excerpts constitute the entire testimony as to the alleged false representations by Mulligan. We think this testimony wholly fails to sustain the charge and furnishes no basis for the verdict of the jury in that regard. Mulligan was there professedly in the interest of the defendant. It does not appear that any statement made by him was false in fact, nor does it appear that there was any artifice resorted to by him, nor does it appear that he knew plaintiff's inability to read the English language. As to the postoffice incident with Pacha, it is not claimed that Mulligan understood the Polish conversation between plaintiff and Pacha. And, even if he had understood it, there was nothing false or misleading in his answer. If it had been in plaintiff's mind to save a cause of action for continuing and future damages rather than to settle as for a permanent injury, his inquiry could have been directed to that point. Mulligan did not purport to read the contract to him, nor did he assume to state what its contents were. It is conceded that the plaintiff had abundant opportunity to ascertain the contents of the contract from the disinterested notary on the following day, and Mul-

ligan knew, when he paid him the consideration, that such opportunity would be afforded to him. To hold that the testimony above quoted is sufficient to nullify the written instrument on the ground of fraud would be to render written contracts practically worthless. *Blossi v. Railway Co.*, 144 Iowa, 698.

So far, therefore, as mere words or statements are concerned, the foregoing is not sufficient to sustain the charge of fraud.

It is contended, however, by the appellee that the unreasonableness of a contract may of itself be an appropriate circumstance in aid of the other testimony as tending to show

2. SAME: fraud: fraud. This proposition may be conceded.
unreasonable- We have read the record with great care. In
ness of settle- the light of it we find nothing unreasonable
ment.

in the contract, nor anything inconsistent with the previous negotiations as a whole. The correspondence between plaintiff's attorney and the defendant company indicated an acquiescence in some delay in the negotiations with a view of awaiting developments of the settling or slipping of the right of way. The embankment necessarily interfered to some extent with the course of surface water flowing toward Walnut creek. The rains which fell upon it must necessarily flow down upon the lower land. It must likewise carry with it more or less of the material from the sides of the embankment. Some settling and slipping was inevitable. This had already taken place when the settlement was had. More or less clay had been carried upon the abutting strip of plaintiff's land. Two or three acres of plaintiff's ground was damaged by the various débris thereon. It is undisputed that the full purchase value of the land at the time of the settlement was not more than \$60 an acre.

The following excerpt from plaintiff's own evidence as a witness is descriptive of the situation as he claimed it:

In December, 1906, the railroad company bought a fifteen-

foot strip of land from me, on the north side of the creek. Prior to that time, just south of this fifteen-foot strip, there was clay over my land. It was about ten inches or so thick. It covered about two acres. I mean that it was ten inches thick at the edge of this fifteen-foot strip, and then tapered off gradually. Some of that two acres would have more clay on it than other parts. There would be on that two acres an average of four or five inches of clay, in 1906. In December, 1911, the clay on the north side of the creek, close to the right of way, was about ten inches thick. There are no more acres covered with clay than there were in 1906, in December. It is a little thicker than it was in 1906. When I put in the oats in 1907 there was some clay on the ground next to the right of way, which covered about two acres. The oats started to grow. Oats don't make as good a crop on clay land as they do on black soil. So, if there hadn't been any rains on that land covered with clay in 1907, the oats would not have been as good there as on the black soil. Those two acres of oats that I didn't cut in 1907 are the same two acres that were covered with clay in 1906. In 1908 I had this in corn. I plowed about four acres next to the right of way. Included in that four acres were the two acres that were covered with clay in 1906. I sowed wheat on those four acres in the fall of 1908, and sowed clover on it in the spring of 1909. When the wheat killed out in 1909 over those two acres, it killed the clover out also. In 1909 I cut all the wheat except those two acres that were covered with clay in 1906. If the water hadn't gotten over that in 1909, it would not have been as good as the other two acres, anyway. I didn't sow any clover in the spring of 1910. Those two acres that I have spoken of were killed in 1909. There were no rains in 1910 that interfered with that land. There was not much rain in 1911. During the springs of 1907, 1908, and 1909 we had very heavy rains. When we have heavy rains Walnut creek nearly always overflows and goes over my land. . . . After the water enters my land it goes over the same ground that it did in 1906. The company put some tile in along the right of way northeast of the creek in 1907. Prior to the time they put that tile in, the water came down there the same way it does now. The tile just took the place of the open ditch. In 1906 they dug a ditch north of the creek along the right of way from the old right of way to the creek. This ditch filled

up, and about three years later they scraped out another ditch. The water has been running in that ditch ever since it was dug. It was dug in 1909. The water on the north side of the creek has not been running down there over my land since 1909, except when it rains hard. They didn't dig the ditch deep enough close to the creek.

Adam Peck testified for the plaintiff as follows:

My farm adjoins this twenty-four acres in controversy. I think there is about fifteen or sixteen acres on the north side of the creek that is all flat, except perhaps one acre of it is on a bluff. On the north side of the creek the water runs down the right of way from the northeast for about 3,000 feet. In 1906 there was a ditch cut on the defendant's right of way, along about the last part of December. The ditch was probably ten or twelve inches deep and about eighteen inches wide. This ditch filled up in the spring of 1907. After the ditch filled up in the spring of 1907, the water that came down the right of way spread over Mr. Zaharyas' land. It continued that way until the fall of 1909. Then they cut another ditch. This ditch is probably three feet wide. In some places it is a foot or a foot and a half, and some places two feet deep. The ditch is not as deep now, in places, as it was in 1910. Next to the creek and next to the old right of way, it is deeper now than it was then. The water coming down has made it deeper. This ditch carries some of the water in time of heavy rains. I guess it has carried all the water that has fell this year. 1911 was a pretty dry year. This ditch along the right of way, at the smallest place, is three or four feet wide, and probably eight or ten inches deep. Water coming over the right of way for 3,000 feet above must come through that ditch in order to get to the creek. There has been some tile laid by the defendant on its right of way northeast of the creek. About eighty rods of tile. I think it is a seven-inch tile. The tile empties out on the right of way about forty rods above the plaintiff's land. From there on it has cut out some ditches on the right of way. The ditch it has cut out along the right of way is ten feet wide in places and six or seven deep in places. This ditch has been cutting some along there ever since the railway was constructed.

From the foregoing it will be noted that plaintiff's land is unavoidably overflowed from Walnut creek by every heavy rain. At such times the water from the right of way must necessarily pass upon it. The ditch running parallel with the embankment toward Walnut creek would necessarily be under the same overflow. The damages claimed in this action for 1907, 1908, 1909, 1910, and 1911 are based upon the same acreage and the presence of clay thereon. The ditch, concerning which complaint is made because of alleged insufficiency, can at its best protect plaintiff's land only when there are no heavy rains to overflow it. Plaintiff's own testimony shows that all his claimed damage resulted from heavy rains. There were no heavy rains in 1911, and the trial court found that there was no evidence of damage, and withdrew that part of the claim from the jury. For the remaining four years the jury found damage of only \$48. Going back, then, to the settlement of December 11, 1906, can it be said, therefore, to be unreasonable that the parties should treat the embankment as a permanent injury to plaintiff's land to be settled for once for all? Could it be said to be less unreasonable to reserve to plaintiff a continuing cause of action for continuing damages of \$10 or \$15 per year to be litigated or settled annually? There is nothing apparently unreasonable in the amount paid for the settlement. In the light of the measure of damage adopted by the jury in the present case, the amount paid in the settlement of 1906 was liberal as for permanent injury. On the other hand, to leave to the plaintiff a continuing cause of action for accruing damages would subject the defendant at any time to an order of abatement of the embankment as a nuisance. As already indicated, the order of abatement entered in this case enjoins the defendant from permitting the water which falls upon its right of way from being discharged upon or across or over the land of the plaintiff. Necessarily water must fall upon the right of way, and it must run down the embankment, and it must run upon plaintiff's land in all times of heavy rain and overflow. Strict obedience

to this order would require the removal of the embankment.

It must be said, therefore, that there is nothing unreasonable or unconscionable in the contract as written which can operate as a circumstance in support of the allegations of fraud.

II. The evidence in this record shows without dispute that it was the understanding between the parties that the defendant company would cut a ditch along or parallel with its right of way for the purpose of carrying a stream of water southwesterly to Walnut creek. Such provision does not appear in the contract. But the ditch was immediately cut, according to testimony on behalf of the plaintiff. It became filled and was again cut in 1909. Whether the plaintiff would be entitled to a reformation of the contract as for mutual mistake as to the provision for the ditch is a question which cannot arise in this case. Even if the provision were contained in the written contract, the plaintiff's case is not bottomed upon the failure of the defendant to cut or maintain the ditch. The ditch was confessedly in operation a part of the time. The testimony in behalf of the plaintiff shows that it was in operation at least in 1910 and 1911, and at least a part of 1907. The damage described by the plaintiff in his testimony for each of such years was identical, regardless of the condition of the ditch. That the ditch cannot protect the plaintiff against the overflow of heavy rains is conceded in his testimony, as already quoted.

All that we hold now is that the evidence wholly fails to sustain the charge of fraud, and this is decisive of this appeal. The judgment and order entered below must therefore be *Reversed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

GODFREY DURST, Appellant, v. THE CITY OF DES MOINES,
ET AL., Appellees.

Municipal corporations: SPECIAL ASSESSMENTS: REMEDY OF PROPERTY

1 **OWNER.** Objection before the city council and appeal to the courts is the exclusive remedy of a property owner who is aggrieved by any error or irregularity in the notices or proceedings leading to a special assessment of his property for an authorized public improvement, and in failing to do so his objections are waived; and in no such case can an independent action in equity be maintained to set aside a special assessment, without a showing of fraud.

Same: VALUATION OF PROPERTY: JURISDICTION. The erroneous valua-

2 tion of property by the city council does not deprive it of jurisdiction to levy a special assessment against it for a public improvement; as this is not a jurisdictional question, but one for determination by the council, and any error of the council in fixing a valuation may be reviewed on appeal, proper objection having been made.

Same: LIMITATION OF ASSESSMENT: SINGLE IMPROVEMENT. The

3 statute provides that no assessment for a public improvement shall exceed twenty-five per cent of the value of the property; but this applies in the case of each distinct improvement without reference to other burdens which the property may have been compelled to bear for other improvements. Thus where property abuts upon two different streets which are improved at different times, each separate improvement may operate to create like special benefits, and will not be treated as a single improvement within the statute limiting the imposition of special assessments.

Same: CONSTITUTIONAL LAW: ASSESSMENT OF PROPERTY: NOTICE:

4 **DUE PROCESS.** As the statute expressly authorizes the city council to levy special assessments for public improvements, and provides that the assessed valuation of the property shall only be *prima facie* evidence of its value, the council in apportioning the benefits may determine the value of the property without notice to the owner; and as the statute provides for notice to the owner of the proceedings leading up to the assessment its valuation without notice does not work a deprivation of property without due process.

Appeal from Polk District Court.—HON. CHAS. S. BRADSHAW,
Judge.

TUESDAY, FEBRUARY 17, 1914.

ACTION in equity to set aside a certain special assessment on real estate in the city of Des Moines, and to enjoin the collection thereof. The defendants' demurrer to the petition having been sustained, and plaintiff electing to stand on his pleading without amendment, the action was dismissed, at his costs, and he appeals.—*Affirmed.*

Dale & Harvison, for appellant.

Robt. O. Brennan, H. W. Byers, and Eskel C. Carlson,
for appellees.

WEAVER, J.—Lot 1 in Shepard's addition to the city of Des Moines fronts to the east on East Second street, and is bounded on its north side by Maple street. Lot 18 lies immediately south of said lot 1, fronting also upon East Second street, and is bounded on the south side by Shepard street. The plaintiff owns the east one-half of the lots so designated, and has no interest in or title to the west half thereof. In the year 1907 the city caused East Second street at this point to be curbed, and for the expense thus created a special assessment of \$32.45 was laid upon each tract. In the following year, 1908, the city caused East Second street to be paved, and of the cost of this improvement the sum of \$266.38 was assessed upon each of said half lots. During the next succeeding year, 1909, the city caused Maple street to be paved along the north side of said lot 1, and of this expense the sum of \$192.27 was assessed upon the east half of said lot. This last or third item is the only one in controversy in this action; but a statement of the first and second items is necessary to an understanding of the grounds upon which the

plaintiff demands relief. The general assessment roll for the years 1907 and 1908 shows the two half lots to have been valued together at \$1,500 for the purposes of taxation. When the special assessments were made in the years 1907 and 1908 for the curbing and paving of East Second street, the subject of the actual value of the property was considered by the city council, and each half lot was found to be worth \$1,500. When the special assessment (the one in controversy) was made in 1909 for the paving and curbing of Maple street, the actual value of the east half of lot 1 was again considered by the city council, and found to be \$1,200. The plaintiff is and at all times has been a nonresident of Des Moines and Polk county, and he was given no notice of the institution of the proceedings or of the assessments proposed to be made except by publication in the manner provided by the statute (Code, secs. 810 and 823). He did not appear in the proceedings at any stage thereof, and did not appeal to the district court from the levy of the special assessment. It should be said, however, that, after the levy of the first and second special assessments for expense of the work done on East Second street, he brought an action in equity to enjoin the enforcement thereof, on the grounds (1) that notice of the consideration of the resolution of necessity had not been published as required by law; (2) that the resolution itself was not sufficiently full or specific; and (3) that the levy made upon the property was in excess of one-fourth of its value as shown by the records of its last assessment for general taxing purposes. The judgment of the trial court denying the relief asked in that case was brought here on appeal of the plaintiff, and affirmed. See *Durst v. Des Moines*, 150 Iowa, 370. Reference to the opinion in that case shows that we there held the objections to the publication of notice and to the sufficiency of the resolution of necessity were not well taken, and as to the third objection it was further held that, even if it should be admitted that the city council erred in not treating the assessed

value of the property as its actual value for the purposes of the special levy, plaintiff's remedy was by appeal to the district court, and, having failed to avail himself thereof, he must be conclusively presumed to have waived the objection.

In his petition in the present action the plaintiff recites the facts relating to the several special assessments mentioned above, and seeks to have the one which was made in 1909 on the east half of lot 1 for the expense of curbing and paving Maple street declared void and unenforceable, upon the theory that, the two prior assessments upon the same property for curbing and paving East Second street having aggregated more than 25 per cent. of its assessed value, it could not lawfully be charged with any additional liability for the work done on Maple street. In other words, it is the theory of the petition that the curbing of East Second street in 1907, the paving of East Second street in 1908, and the curbing and paving of Maple street in 1909 constituted in law and in fact but a single improvement, for which, under the provisions of Code Supplement, sec. 792-a, the property in question could be made liable to no greater amount than 25 per cent. of its assessed value, and that, such limit having been reached in the two earlier levies, the present special assessment for the paving on Maple street is void for want of authority in the city council to make it.

In a second count of the petition the plaintiff makes the further claim that, even if it be conceded that under the statute it was competent for the council to find the actual value of the property to be in excess of the estimate shown by the general assessment roll, and to make special assessments thereon up to the limit of 25 per cent. of such actual value, yet this could lawfully be done only upon notice given to plaintiff and opportunity afforded him to contest such question of actual value. He alleges that no such notice or opportunity was given, and because of such omission the act of the council in treating the property as of a value greater than was shown by the general assessment roll was unau-

thorized, and the enforcement of a levy so made operates to deprive him of his property without due process of law in violation of familiar constitutional provisions.

I. The questions thus raised are not altogether new, though perhaps not before presented to us in a form quite so concrete or definite, and they have been argued with the painstaking care and thoroughness which are characteristic of the learned counsel who bring them to our attention. The law prescribing and limiting the power of municipalities to make street improvements, and more particularly improvements the expense of which is to be laid upon abutting property, is a prolific source of litigation, and it is to be confessed that the courts, in their anxiety on the one hand to preserve the rights of the individual property owner against confiscation or undue aggression, and to avoid on the other hand such narrowness of statutory construction as will hamper or defeat the progress of authorized municipal improvements, have found it very difficult to so plainly define the jurisdiction of a city council and the necessary incidents thereto as to remove that question from the field of debate. A more or less successful attempt to accomplish that end has been made by the Legislature in framing our present Code and its amendments.

Jurisdiction of the parties interested in the institution of proceedings for such improvement is obtained by publication of notice of the preliminary resolution of necessity.

Code, sec. 810. Jurisdiction to make special assessments for the cost of an improvement so authorized and constructed is obtained by publication of notice of the time when and place where objections thereto may be presented and considered. Code, sec. 823. These notices being given in the statutory manner, all property owners are presumed to have cognizance of the details involved in the preparation for and execution of the work of improvement, and, if there be any ground of complaint on account of errors or irregularities

1. MUNICIPAL
CORPORATIONS:
special assess-
ments: remedy
of property
owner.

in the special assessments, or on account of any of the prior notices or proceedings leading up to such assessments, the party aggrieved must appear before the city council and make the objection on which he relies, and, failing so to do, his objections are deemed to have been waived. Code, secs. 823 and 824. The only exception to this rule which the statute recognizes is where fraud is shown. If, having made his objections known to the city council as provided by law, they are overruled or ignored, he may have the proceedings reviewed upon appeal to the district court. Code, sec. 839. If there was ever any doubt whether this remedy was exclusive, and that under such circumstances, and without showing of fraud, no action can be maintained in equity to set aside or annul a special assessment for a work of public improvement, it no longer exists. *Railroad Co. v. Lindquist*, 119 Iowa, 144; *Owens v. Marion*, 127 Iowa, 469; *Nixon v. Burlington*, 141 Iowa, 316; *Land Co. v. Des Moines*, 144 Iowa, 629; *Reed v. Cedar Rapids*, 137 Iowa, 107; *Andre v. Burlington*, 141 Iowa, 65; *Durst v. Des Moines*, 150 Iowa, 370.

It is necessary consequence of the cited statutes and the decisions of this court relating thereto that, if the plaintiff herein has any standing in a court of equity as an applicant for relief from the special assessment complained of, it must be because such assessment is for some reason absolutely null and void. No complaint is made, nor is any fact stated, tending to show any failure or omission to publish the statutory notice of the preliminary resolution or notice of the time and place where the matter of special assessments was to be considered. On the contrary, the allegations of the petition are such that upon demurrer thereto we must presume the giving of the proper statutory notices, and, there having been no appeal from the assessments, their sufficiency must be taken as unimpeachable, unless it shall appear from the facts alleged by the plaintiff that, no matter how regular and technically perfect the proceedings of the city council in ordering and constructing the improvement, it was clearly and distinctly

beyond its power and authority to impose and charge liability of any kind upon the said east half of lot 1 for improvement of Maple street, which bounded and abutted it on the north side. And such, if we understand plaintiff's counsel, is the position they take.

Passing for the present the constitutional objection, we are quite clear the ground thus taken is not tenable. The power to pave and improve its streets and assess the cost upon abutting property is expressly given the city. Code, sec. 792. True, that power is limited by the provision that, when the city levies a special assessment for any public improvement against any tract of land, such assessments shall not be in excess of the special benefits conferred, or in excess of 25 per cent. of the actual value of such tract at the time of the levy, of which value the last preceding assessment roll shall be *prima facie* evidence. Code Supp. 1907, sec. 792-a. But this provision necessarily vests the council with authority and imposes upon it the duty to inquire into and consider the actual value of each abutting tract of land in order that the special assessment it proposes to make shall not exceed the statutory limit. The determination of this question inheres in every assessment made by the council. An error in estimating the value of the property, or in the extent of the special benefits accruing to the land, or in the amount properly chargeable to any abutting property, does not go to the jurisdiction of the council, but to an incident or detail of the proceedings, and the property owner complaining thereof should lay his objection before the council, and upon an adverse ruling there may appeal to the district court. In no other way can the statute be given practical effect or the decisions above cited be sustained.

The property in the present case admittedly abuts upon the improvement. There is, as already said, no showing or claim that the statutory notices required in such cases were not duly published, and such service has always been held

sufficient to charge the owner, although a nonresident, with notice of the proceeding. Upon such a record the plaintiff's failure to pursue his remedy by appeal forecloses his claim for relief against a special assessment on abutting property. If plaintiff believed or claimed that his property had already been assessed to its full statutory liability for this same improvement, and should therefore be exempt from contribution to the cost of paving Maple street, it was his undoubted right to assert that claim before the city council, and it was equally within the undoubted jurisdiction of the council to consider and pass upon the issue so raised. To say that under such circumstances a property owner may withhold his appearance and objections in the proceedings of which he has been duly notified, and go into equity to vacate an assessment which he might have successfully resisted in the tribunal established for that purpose, would be to destroy the efficiency of the law enacted for the construction of public improvements. In short, assuming, as we must, that the proceedings before the council for the construction of the improvement in question were regularly instituted by service of the proper notices and jurisdiction thereby acquired by the council to consider and pass upon the liability of abutting property to contribute to the cost of such improvement, we hold that, plaintiff having failed to make known his objections to the assessment upon his property, and having failed to take advantage of his right to appeal from such assessment, an action in equity will not lie on his behalf to contest the validity or amount of such assessment.

II. Even were the point just decided to be waived or ignored, we should be compelled to hold against the plaintiff upon his contention that the curbing and paving done on East Second street in 1907 and 1908 and the curbing and paving done in 1909 on Maple street were in law or in fact one and the same improvement, so far as relates to the property in question. The question thus raised is not analogous to the one consid-

3. SAME: limitation of assessment: single improvement.

ered by us in *Bailey v. Des Moines*, 158 Iowa, 747. In that case the city had adopted the scheme of letting the paving and curbing of a street in separate contracts, the work in both being carried on at the same time, and constituting to all intents and purposes a single improvement; and we held that the combined cost of both paving and curbing was to be taken into consideration in determining whether the statutory limit of liability to which abutting property could be subjected on that account had been exceeded. The conclusions there reached and the decision there announced we adhere to without qualification. Here, however, we have to consider two distinct streets which happen to intersect and a tract of land which happens to be situated at the intersection. In other words, it is a "corner lot," abutting at one end on one street, and at one side abutting upon the other street.

East Second street was first improved, and for the purposes of this case we may concede that for this improvement the corner lot was subjected to a special assessment to the full one-fourth of its actual value. Later Maple street was also ordered paved. On what theory can it be said that the old paving on the one street and the new paving on the other street constitute a single item or unit of improvement? It is true they intersect at this corner, and they each improve the ease and means of access to the same lot, and facilitate public use of an adjacent highway. But likeness of improvement is not identity of improvement. Suppose, for instance, that a party owns an entire tract surrounded by four several streets, and the city following the commonly observed custom, extends its paving gradually to accommodate its growth in population and business, improving perhaps one street at a time at intervals of a year or several years; may such owner properly insist that the entire paving which surrounds his lot, though it includes parts of the improvement of four distinct streets constructed at different times and pursuant to different ordinances, is yet a single improvement as to his property? It would be a most unwarrantable perversion

of language to so hold. The language of the statute is that, "when any city council levies any special assessment for any public improvement against any lot or tract of land, . . . such assessment shall not be in excess of twenty-five per centum of the actual value of the lot or tract at the time of levy and the last preceding assessment roll shall be taken as *prima facie* evidence of such value." In other words, each separate public improvement is to be dealt with on its own merits, and according to its own peculiar circumstances, and the limit of 25 per cent. is to be applied in the case of each distinct improvement, without reference to other burdens which the property may have been compelled to bear for the construction of other improvements. That the paving of two different streets constitutes two distinct improvements we think is not open to serious doubt, and the fact that the separate improvements may each operate to create like special benefits upon the same lot does not serve to effect their coalescence into a single improvement for the purposes of the statute limiting the imposition of special assessments. In the form here presented the question under consideration has never been directly passed upon by this court; but the statute is not so obscure as to call for frequent judicial construction.

It has been held that assessments upon the same corner lot for similar improvements made upon two streets bordering its front and side lines are not double taxation (*City v. Dorr*, 31 Iowa, 89; *Morrison v. Hershire*, 32 Iowa, 271)—a rule which involves to some extent the principle which we here affirm. And indeed, the fact that the paving of different and distinct streets constitutes different and distinct items or units of public improvement even where the same lot is affected is so evident from the mere statement that it is somewhat difficult to make it clearer by interpretation or illustration. It is only when we import into or extract from the words of the statute something more than is there plainly expressed that any room for doubt is found.

III. The constitutional question, if we correctly appre-

hend the position of counsel, is that, in the absence of evidence to the contrary, the city council in levying a special assessment is bound to accept the value of the property as shown by the last preceding assessment roll. It is further contended that the fixing of any greater value upon such property than is shown by the assessment roll is in effect an increase of its assessment for the purposes of such special taxation, and this can constitutionally be done only upon notice to the owner and opportunity given him to resist such increase. It is also alleged, and the demurrer admits, that no notice was given the plaintiff of the action of the council finding the property to be of greater value than is disclosed by the assessment roll, except such constructive notice as was given by publication as hereinbefore mentioned. For this reason, plaintiff says the effect of this action of the council is to deprive him of his property without due process of law. The statement of constitutional right is, as an abstract proposition, concededly sound; but the facts alleged in the petition fall far short of making a case for its application. The statute referred to does not provide for an assessment of the property nor an increase of its assessment as a basis of taxation. The city council did not assess or increase the assessment of the lot in question. The statute did not require the council to adopt the value of the lot as shown by the last preceding assessment roll. On the contrary, it specifically provides that the limitation of the liability of the property shall be 25 per cent. of "the *actual* value of the lot or tract at the time of the levy of the assessment," and the only reference to the last preceding assessment roll is to make it admissible as "evidence of such value." A special assessment is not a tax levied upon property according to its value. The charge or levy laid thereon is specific rather than *ad valorem*, and until the enactment of the cited statute (Code Supp. 1907, section 792a) the burden so imposed had no relation to the value of the property, but was limited alone by the extent of the bene-

4. SAME: constitutional law: assessment of property: notice: due process.

fits accruing to the property from the improvement the cost of which was thus provided for. It might happen and sometimes did happen that a valid special assessment would exceed the value of the property as it stood before the improvement. The present statute does no more than to limit such liability to 25 per centum of the actual value of the property at the time of the levy, but in no manner changed the nature of a special assessment.

Now, as we have already said, the matter of apportioning the cost of the improvement to the several tracts of property was a duty expressly committed to the city council. It was an essential part of the proceedings which had been regularly instituted for the improvement of Maple street. Notice of the assessment and of the time and place for hearing of objections thereto was given as the statute provides, and this, we think, was due process of law within the constitutional meaning of that phrase. *Ross v. Supervisors*, 128 Iowa, 438; *King v. Portland*, 184 U. S. 61 (22 Sup. Ct. 290, 46 L. Ed. 431); *Hagar v. District*, 111 U. S. 701 (4 Sup. Ct. 663, 28 L. Ed. 569); *Bank v. Pennsylvania*, 167 U. S. 461 (17 Sup. Ct. 829, 42 L. Ed. 236); *Railroad Co. v. Backus*, 154 U. S. 421 (14 Sup. Ct. 1114, 38 L. Ed. 1031); *Paulsen v. Portland*, 149 U. S. 30 (13 Sup. Ct. 750, 37 L. Ed. 637); *Railroad Co. v. Minnesota*, 159 U. S. 526 (16 Sup. Ct. 83, 40 L. Ed. 247); *Hibben v. Smith*, 191 U. S. 310 (24 Sup. Ct. 88, 48 L. Ed. 195); *Spencer v. Merchant*, 125 U. S. 345 (8 Sup. Ct. 921, 31 L. Ed. 763); *Ballard v. Hunter*, 204 U. S. 241 (27 Sup. Ct. 261, 51 L. Ed. 461).

The substance of these holdings is to the effect that, if provision is made for notice to and hearing of the property owner at some stage of the proceedings upon the question as to what proportion of the cost of the improvement shall be assessed upon his land, there is no taking of property without due process of law. The statute authorizing the paving of city streets does provide such an opportunity and for notice thereof by a prescribed manner of publication before the

levy is made. It would have been competent for the Legislature to make the finding of the council conclusive upon the matter of such objections (see *Ross v. Supervisors*, *supra*); but it goes further and gives the owner the opportunity of another hearing on appeal, and this certainly answers all the requirements of due process. Due notice for this purpose may be given by publication. See *Ballard v. Hunter*, 204 U. S. 241 (27 Sup. Ct. 261, 51 L. Ed. 461), and cases already cited. Notice being given, the plaintiff must be presumed to have known that the council was authorized to charge his property with its proportion of the expense of the paving up to the statutory limit of 25 per cent. of its actual value at that time, not its value at the time the last preceding assessment roll was made, but its value as it then stood "at the time of the levy of the assessment"; reference being had to such assessment roll only as a matter of evidence bearing upon the then present value. We are to presume that the council did its duty, and gave the assessment roll due consideration as an item of evidence; but its finding that the value at the time of the levy was largely in excess of that stated in the roll was clearly within its power to make, and error, if any, therein could be corrected only on appeal. He has been denied no right assured to him by the Constitution or by the statute, and the trial court was correct in holding that an action in equity to set aside the special assessment could not be maintained.

We do not undertake any review of the many authorities called to our attention. We have examined them with care, and find them not inconsistent with the views here expressed or the conclusions here reached.

For the reasons stated, the decree of the district court is *Affirmed*.

LADD, C. J., and DEEMER, EVANS, PRESTON, GAYNOR, and WITHROW, JJ., concur.-

ELENA O'CONNELL, Appellee, v. CITY OF DAVENPORT,
Appellant.

Municipal corporations: REPAIR OF STREETS: NEGLIGENCE: INSTRUCTION. 1 A city has the right to repair its streets, and in doing so may tear up a defective pavement and obstruct the street, if necessary, without liability in consequential damages resulting therefrom, when the work is performed with ordinary skill and prudence; and persons using a street when undergoing repairs are held to such a degree of care as an ordinarily prudent person would exercise under the same conditions. The requested instruction on the subject should have been given in the instant case.

Personal injury: MEASURE OF DAMAGES. 2 The particular employment and salary received prior to the time of a personal injury may be considered on the question of damages, but the proper measure of damages is impaired ability to earn money generally. An instruction limiting the right of recovery to the loss of earnings from plaintiff's employment prior to the injury was erroneous.

Appeal from Scott District Court.—HON. F. D. LETTS, Judge.

TUESDAY, FEBRUARY 17, 1914.

ACTION to recover damages for personal injury occasioned by a fall upon a street, alleged to have been caused by a defect in a sidewalk. Judgment for plaintiff. Defendant appeals.—*Reversed.*

Henry Vollmer and Sharon & Higgins, for appellant.

W. M. Chamberlain, for appellee.

GAYNOR, J.—This is an action to recover damages for personal injury claimed to have been sustained by the plain-

tiff on the 20th day of July, 1911, occasioned by a fall upon one of the public streets of defendant city, known as Harrison street. In her petition she alleges that on said date said street was being repaved, and on account thereof it was quite a step from the ground to the sidewalk at and near the southwest corner of Harrison and Fourth streets; that on said date, and for a number of days prior thereto, bricks in the sidewalk at and near said corner, and extending from said corner along the curbing on Harrison street for a number of feet south of the corner, where said sidewalk begins, were in a loose and dangerous condition; that she stepped on one of the loose bricks which moved and turned her foot and caused her to fall and sustain the injuries of which she complains. The defendant's answer was a general denial.

The cause was tried to a jury and a verdict returned for the plaintiff, and, judgment being entered upon the verdict, defendant appeals and assigns as error the refusal of the court to submit the following instruction on the request of the defendant:

If you find from the evidence that the defendant was reconstructing or repairing Harrison street, at the point where said injury is claimed to have occurred, then you are instructed that the city of Davenport has by law the right to repair and reconstruct its streets and to adopt plans and specifications for such repair and reconstruction, and it has the right, in furtherance of such object, to tear up the existing pavement, and persons using said street would be held to a degree of care in such use as an ordinary prudent person would exercise under the same conditions.

The evidence tended to show that, at the time she received the injuries of which she complains, Harrison street was being repaved. The old bricks were still in the street in some places and torn up in others. The intersection at Harrison and Fourth streets was torn up. The bricks had been taken out in some places. In the process of reconstructing or repairing the street, the sidewalk was partially torn up, and

the curbing was being replaced. A few of the bricks in the sidewalk back of the curb were taken up in order to cut it down. These bricks were never removed until it was necessary for that purpose. It appears that in putting in the curbing it was necessary, for the purpose of alignment, to dig out a layer of brick, or whatever portion of the sidewalk lay next to it.

It will be noticed that the plaintiff states in her petition, as a basis for recovery, that her injuries were due to defects in the street and sidewalk at the place where the street was then being repaved; that at and near the corner, and extending from the corner along the curbing on Harrison street for a number of feet south from the corner, where the sidewalk begins, the bricks therein were in a loose and dangerous condition. To determine a liability on the part of the city therefor under this allegation, it was necessary for the jury to determine whether or not these loose bricks, of which she complains, were or were not there, as a reasonably proper incident to the work of repair then carried on by the city.

The city had a right to repair its streets. It is not liable for consequential damages resulting from the exercise of this right when performed with ordinary skill and prudence. It

is not sufficient to show that the street was
 1. MUNICIPAL CORPORATION: repair of streets: negligence: instruction.
 torn up and out of repair as a natural and proximate result of the exercise of the right
 of the city to make repairs, for, under the

law, the city has a right of entry upon its streets to reconstruct, repair, or improve the same, and to that end it has a right, and it is its privilege, to tear up and obstruct the street, if necessary, in the making of public improvements of this character. The exercise of this right in itself and the conditions that reasonably and necessarily result from the exercise of this right does not constitute negligence. How it could make repairs of this character, without tearing up some portion of the street, is not conceivable. The evidence

tended to show that in making repairs some of the bricks became or were loosened. If this was a necessary incident to the right of the city to make repairs, there could be no liability. To create a liability it must appear, further, that there was negligence in the doing of the authorized act, and that this negligence was the proximate cause of the injury. Or, in other words, where the party is engaged in the doing of a legal act, or that which the law commands or permits, the creation of conditions which are reasonably incident to the exercise of this right, and the accomplishment of the purpose authorized in the power granted, or the duty imposed, does not constitute negligence, and so, unless, under instructions properly given, the jury find negligence independent of or in the manner of the exercise of the right, there is no liability.

The court gave no instruction embodying the thought contained in the instruction asked, but told the jury that it was the duty of the city to keep its sidewalks in a reasonably safe condition for ordinary travel thereon, and said to the jury that, to make the city liable for any defects which cause an injury, it must appear that the sidewalk was out of repair so that it was likely to cause injury to persons passing over the same, or, in other words, was in a condition not reasonably safe for ordinary travel thereon; that, if it failed to keep the street in a reasonably safe condition for ordinary travel, it was negligent, and for such negligence was liable, ignoring entirely all thought or suggestion as to the cause of such condition, or as to whether the condition was rightfully produced or wrongfully produced.

We think the court erred in its refusal to give the instruction asked, and for this error the cause ought to be reversed. See *Hume v. Des Moines*, 146 Iowa, 624; *Walters v. City*, 145 Iowa, 457; *Elam v. City*, 132 Ky. 657 (117 S. W. 250, 20 L. R. A. (N. S.) 512); *Williams v. Tripp*, 11 R. I. 447; *Stevens v. Citizens' Gas Co.*, 132 Iowa, 597, and cases therein cited.

Error is predicated on an instruction, given by the court to the jury, on the question of damages. We think the error in this instruction lies in the fact that the court limited the jury, in determining plaintiff's damage, to the loss of earnings as fixed in the employment prior to the injury, making that the measure of her right to recover, both for the past and for the future, while the true measure of damage is the impairment of ability to earn money generally. There must be an impairment of capacity to earn money generally. The separate employment of the plaintiff and what she was earning prior to and at the time of the injury may be shown and considered by the jury in estimating her loss, but this does not fix it for all future time. See *O'Conner v. C., R. I. & P. Ry. Co.*, 144 Iowa, 289.

For the errors pointed out, the cause is *Reversed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

JOHN B. LAVELLE, ET AL., Appellants, v. PATRICK LAVELLE, ET AL., Appellees.

Conveyances: CONSIDERATION. A conveyance of land reciting a consideration in hand paid, and fully executed, cannot be set aside for want of consideration.

Same: CONFIDENTIAL RELATION: BURDEN OF PROOF: UNDUE INFLUENCE.
 2 Where the evidence that a mother, though of advanced age but able to look after her own affairs, conveyed to her son the farm on which they lived, reserving the life use of part of the house, and he gave her back a life lease providing for a certain rental, he to pay all taxes, there was no such showing of a confidential relation between them as would shift the burden to the son of proving that the transaction was fair and free from fraud. Nor was there any such evidence of undue influence as would avoid the conveyance.

Appeal from Sioux District Court.—HON. WM. HUTCHINSON,
Judge.

TUESDAY, FEBRUARY 17, 1914.

SUIT in equity to set aside a conveyance of land, made by Mary Lavelle during her lifetime to the defendant, Patrick Lavelle, on the 8th day of September, 1908, upon the ground of the mental incompetency of the grantor, and by reason of fraud and undue influence. A partition was also asked, and an accounting for the rents and profits. The answer admitted the conveyance, but denied the other allegations. Upon a trial to the court there was a finding for the defendants, and a decree was entered, dismissing the petition, at plaintiffs' costs, and plaintiffs appeal.—*Affirmed.*

George T. Hatley and Anthony Te Paske, for appellants.

Fitzpatrick & Frantzen, and *Van Oosterhout & Hospers*, for appellees.

DEEMER, J.—Plaintiffs and defendants, aside from two women, who are the wives of some of the parties, are the children and grandchildren of Mary Lavelle, who departed this life November 28, 1911, at the age of eighty years. She was married to Patrick Lavelle in Ohio in the year 1861, and came with him to Iowa in the year 1876. During that year they purchased eighty acres of the land in controversy, lying in Sioux county, and title was taken in the name of the husband. Thereafter they acquired two hundred and forty more acres, and the title to all of it was finally put in the name of the wife, Mary. It is suggested that the title was taken in her name to avoid certain judgments which stood against her husband. They lived upon the land until the year 1900, when they moved to the town of Maurice, where they lived until about the year 1902, when they moved to the town of Struble, and lived there until the husband's death, in the year 1904. Upon his death the widow moved back to the farm, which was then being cultivated and used by two sons, Patrick and John,

and occupied four upstairs rooms in the house on the land, doing her own cooking, and caring for the rooms herself, until she died, in the year 1911. The son John married, and left the farm in the year 1905; but Patrick continued to remain thereon under a lease from his mother down to the time of the making of the deed in question. Just prior to the death of her husband she made a will in which she gave him a life estate in the land, \$500 to a daughter, Kate Sullivan, \$1 to each of her grandchildren, and divided the remainder equally between her sons John and Patrick. In the year 1907 she sold one hundred and sixty acres of the land, which was covered by mortgage, to a stranger, and made a deed to him in March, 1908; the remaining one hundred and sixty she conveyed to her son Patrick September 8, 1908. The conveyance was by warranty deed; but the son gave her back a life lease, providing for a rental of \$360 per annum, he to pay the taxes, and the deed reserved to the widow the use of certain upstairs rooms in the house during her life. On the same day she executed a new will, disposing of the remainder of her estate—giving one share thereof to her son John, another to her daughter Kate, and another third to her grandchildren, the surviving heirs of a deceased daughter who married a man by the name of Hannon.

At that time she had, in addition to the land, some household goods and about \$6,000 in cash. Her only living children were John B. and Patrick Lavelle and Kate Sullivan. The farm was worth at this time about \$16,000. It is claimed that, at the time of the making of the conveyance and of the will, Mrs. Lavelle was suffering from arterial sclerosis and heart lesion, and was mentally incompetent to transact business, that the deed was procured from her, without consideration, by fraud and undue influence, and that it should be set aside. No present attack is made upon the will.

Two propositions are relied upon for a reversal: First, it is said that the testimony shows such mental incapacity

of the grantor, Mrs. Lavelle, that the deed should be set aside; and, second, that Patrick, her son, occupied a confidential relation toward her, and that the burden is upon him to show that the deed was fair, free from fraud and undue influence. It is also suggested that, as the deed was without consideration, it may be set aside on this ground alone; but this is manifestly an incorrect proposition. The deed had a consideration. But, if this were not true, it recites one as in hand paid, and, as it was fully executed, it cannot be set aside for want of consideration. This is fundamental law, for which no authorities need be cited.

The first proposition is wholly and solely a fact question, and the second is also bottomed upon a fact, to wit, did the grantee occupy a fiduciary or confidential relation toward his mother? If he did, then the rule of law contended for by appellants applies; but there would still remain a fact question for determination, i. e., Was the deed fair, and was it fully explained to, and understood by, the grantor, and was it free from fraud, misrepresentation, deceit, or overreaching? So that at the bottom of this controversy are the questions of fact suggested. Upon these the trial court evidently found with the defendants, and we are asked to reverse these findings.

We have carefully gone over the testimony relating to Mrs. Lavelle's condition of mind at the time she made the deed in question, and executed her last will, and fail to find enough of it to justify a finding of mental incompetency at that time. Practically every circumstance relied upon as occurring prior to execution of the deed is easily explainable, and no one, it seems, questioned her competency to transact business down until near the time of her death. In fact she did transact her own business with seeming judgment and discretion during the years 1908, 1909, and 1910, and on until shortly before the time of her death, and often did business with some of

the witnesses who now claim that they saw evidence of mental defects.

We are satisfied that, but for the fact that some of the heirs now think she did not make an entirely equitable distribution of her property by her deed and will, we should never have heard of this case. Taking all the facts, there is nothing in the method of distribution, or in the distribution itself, which, standing alone, indicates any particular inequalities, or such as any rational person might not well have made, and, aside from this, the facts relied upon to show insanity prior to the date of the deed and will are trivial in character. She may, and doubtless at the time of her death did, have arterio sclerosis; but at that time she was eighty years of age, and it is now general knowledge that "a man is as old as his arteries." During the last few years of her life, this may have affected her mind to a degree; but there is nothing in the record to indicate such a case of *senile dementia* as to make it probable that her mind was at all diseased at the time she made the deed in question.

It would be without profit to set out the testimony in detail; indeed, some of it relied upon by plaintiffs, some of it from heirs, or devisees, under the will, was incompetent, and should not be considered. *In re Goldthorp*, 94 Iowa, 336. Indeed, it so happens, as is generally the case, that this was put in the strongest terms used by any of the witnesses.

II. Coming, now, to the second question, which really involves two propositions, we may say that the record does not show any such confidential and fiduciary relations between grantor and grantee (mother and son) as

2: SAME: confidential relation: burden of proof: undue influence: would justify a holding that the burden of proof is upon the latter of showing that the

transaction was free and fair, without fraud, deceit, or undue influence. The son did nothing more, if indeed he did as much, as is usually expected from one occupying the same relations. As a rule the mother looked after her own affairs, and whatever her son did for her was generally

by her express and specific directions. It was her will and judgment which was executed and carried into effect, and not his. The will first executed by her, which was at a time when it is conceded she was sound of mind, indicates her thought at that time, and she did not thereafter select any other objects of her bounty, although to some extent she modified its provisions due, as it appears, from change of circumstances and conditions.

The deed in question, although placed of record and known to all interested parties in the year 1908, was never challenged until after the grantor's death; and then by some of the people who had business transactions with her down until January of the year 1911. There is nothing to show that the grantee of the deed ever made a single suggestion to his mother about making the deed in question. It is true that Mrs. Lavelle asked her son Patrick to take her to town on the day the deed was executed, saying that she wanted to see an attorney on business. The son did this. The mother went to the attorney, and talked with him about disposing of her property. She fully explained to him what she had done for her children, all of which was true. She stated in a general way the amount of her property, and apparently had no fixed design when she went to the attorney's office as to just how she would carry her purposes into execution. The making of the deeds, leases, etc., was suggested by the attorney as a means for accomplishing her purposes, and they were accordingly draughted, read, and signed, the latter taking place in the presence of the grantee soon after the matter was fully explained to him, and the only suggestion he made was that, if the yearly rental for the land to the mother was not enough to take care of her, he would pay more. The mother said the amount was ample for the rental, and this was fixed, and also the reservation in the deed. The testimony of the attorney as to part, at least, of this transaction was competent. *Winters v. Winters*, 102 Iowa, 53; *Barry v. Walker*, 152 Iowa, 156; *Chambers v. Brady*, 100 Iowa, 622.

Nothing in *Denning v. Butcher*, 91 Iowa, 425, relied upon by appellant's counsel, runs counter to this holding.

As plaintiffs' case, in its last analysis, rests primarily upon the proposition that the burden rested upon appellees, we may with propriety here cite, in support of our conclusion that the case does not show such a state of facts as to change the ordinary rule that the burden of proof is upon the party attacking the conveyance, the following cases: *Chidester v. Turnbull*, 117 Iowa, 168; *Brackey v. Brackey*, 151 Iowa, 99; *Mallow v. Walker*, 115 Iowa, 238; *Vannest v. Murphy*, 135 Iowa, 123.

The decree seems to be correct, and it is *Affirmed*.

LADD, C. J., and WITHROW and GAYNOR, JJ., concurring.

M. L. BILLY and MARY E. BILLY, v. GEORGE W. DAVENPORT and EMMA DAVENPORT, Appellants.

Contract for exchange of property: TENDER: SUFFICIENCY. Where

- 1 one of the parties to a contract for the exchange of lands, who was obligated to pay a cash difference, offered to pay and had more than the amount available, which would have been produced had not its production been waived, the tender was sufficient.

Same: ABSTRACT: MERCHANTABLE TITLE. A contract to furnish a "mer-

- 2 chantable abstract of record," requires that it shall epitomize the record, simply, but must be one which is acceptable in the ordinary course of business to a reasonably prudent purchaser or mortgagee, when advised of the facts and of the law involved.

Same: MERCHANTABLE ABSTRACT: DEFECTS. An abstract of title dis-

- 3 closing that land in a foreign state was purchased of the state by plaintiff's remote grantor, one "Price," the patent reciting "to have and to hold the same * * * unto said R. R. Rice and to his heirs and assigns forever," did not disclose a "merchantable title of record," and an affidavit that the land was in fact patented to Rice and that the mistake was that of the recorder did not cure the defect, there being no statutory provision of the state au-

thorizing the correction of such discrepancies by affidavit, or for recording the same.

Same. The judgments of a Federal Court constitute liens upon real
4 estate located in the county where the court is held, and an abstract failing to contain a certificate showing that there were no judgments of that court affecting the title was not merchantable.

Same. Under a contract to convey land subject to a stipulated amount
5 of mortgage indebtedness, an abstract showing a greater amount of unsatisfied mortgages, though in fact a portion of the indebtedness was paid, was defective in failing to show the actual extent of the incumbrance; in the absence of some satisfactory extraneous evidence showing payment or a deposit of money to cover any possible difference.

Foreign laws and usages: EVIDENCE: CONCLUSION. The unwritten law
6 of another state and the usage and practice under its written law may be proven by the evidence of attorneys practicing in that state; but the opinion of attorneys engaged in practice in a foreign state that an abstract of title to land in that state was not merchantable was incompetent, because a mere conclusion.

Specific performance: CONDITIONS PRECEDENT: TENDER. The burden
7 of proving tender of performance substantially as provided in a contract for the exchange of lands is upon the party seeking specific performance of the contract; and this includes the agreement to furnish a "merchantable abstract of record" at the time of exchanging deeds, independent of any requisitions by the other party; and a failure to do so will defeat specific performance.

Appeal from Keokuk District Court.—HON. HENRY SILWOLD,
Judge.

TUESDAY, FEBRUARY 17, 1914.

SUIT for specific performance resulted in a decree as prayed. The defendants appeal.—*Reversed.*

J. C. McCoid and Stockman & Baker, for appellants.

Dan W. Hamilton and Irving C. Johnson, for appellees.

LADD, C. J.—The parties hereto entered into a written contract November 18, 1912, for the exchange of farms. Plaintiff's farm was located in Bourbon county, Kan., contained four hundred and eighty acres, was estimated to be worth \$28,800, and was to be conveyed subject to a mortgage of \$7,160. Defendant's farm was situated in Keokuk county, contained two hundred and eighty acres, was estimated to be worth \$35,000, and was to be conveyed subject to a mortgage of \$8,000. The deal was to be closed January 1, 1913, at the time of the exchange of deeds, and each was to "deliver unto the other a merchantable abstract of record showing title in the one so conveying," and "at the time of the exchange of deeds and abstracts, as aforesaid, the parties of the second part are to pay unto parties of the first part the sum of \$5,360 in cash." Time was of the essence of the contract. It was made subject to approval on inspection of the Kansas farm. George W. Davenport looked at this shortly thereafter, and approved the contract. About the middle of December following, an abstract thereof was furnished Davenport who on the 19th of that month mailed it to Billick's attorney, writing:

I desire to state from my examination of this title that it does not comply with my contract, and it does not show a good merchantable title of record. I do not care to go to the trouble or work of pointing out all the specific defects in the title, for if I made such an attempt, I might waive those that I (in my hurried examination) may have overlooked. You are an attorney and I presume are representing M. L. Billick and wife and as an attorney you ought to know what it takes to make a title such as the contract calls for. This deal could not be closed up as you know prior to Jan. 1, 1913, and if your people expect to close up this deal at that time I will expect them to comply with their contract. I will meet you at Albert Ball's office in Delta, Keokuk county, Iowa, on the afternoon of Jan. 1, 1913. I will then make a more careful examination of these papers with a view of closing up the deal. I do not wish anything I say in this letter to be understood as waiving any part of my contract with the Billicks.

The parties, together with their attorneys met in Ball's office, as proposed, on January 1, 1913, and the abstract and conveyance of the Kansas land was submitted to Davenport's attorney. After examining the same for some time, he rejected the abstract as not being merchantable, declining to point out specific defects, for that by so doing he might waive others, and declared Billick would rescind the contract because of the abstract not complying with the contract.

As the abstract to Davenport's land was satisfactory, Billick's attorney tendered Davenport the agreed difference of \$5,360. The production of money was waived provided

1. CONTRACT FOR
EXCHANGE OF
PROPERTY: ten-
der: suffi-
ciency.

it was at the bank. Billick had \$3,000 at the bank at Delta, and it had set apart for him \$3,500 of its money at the instance of a bank at Oskaloosa. A note was to be executed therefor if the bank's money were used. The money then was available at the bank, and would have been produced had not defendant's attorney waived its production and the tender was sufficient. On the following day, this suit for specific performance was begun, and the only issue to be determined is whether the abstract was such as Billick was, by the contract, required to furnish.

It will be observed, at the time of the exchange of deeds, each was to deliver unto the other a merchantable abstract of record, showing title in the one conveying. This was tanta-

2. SAME: ab-
stract: mer-
chantable title.

mount to exacting an abstract disclosing a merchantable title. Such a title is said to be one which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for a loan of money. *Fagan v. Hook*, 134 Iowa, 381. The test is whether a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would accept such a title in the ordinary course of business. *Williams v. Bricker*, 83 Kan. 53 (109 Pac. 998, 30 L. R. A. (N. S.) 343). The facts, however, must be such only as appear of record, for it was "a merchantable ab-

stract of record'' which was to be furnished. Such a one merely epitomizes the record without anything *aliunde*. *Lundy v. Surls*, 144 Iowa, 670; *Fagan v. Hook*, 134 Iowa, 381.

Was the abstract such as required? We think not, and will point out some of the defects which seem to us fatal.

I. The first recital in the abstract is of a patent of the N. E. $\frac{1}{4}$, section 36, township 25 south, range 22 east, fifth p. m., from the state of Kansas, dated January 9, 1886, and recorded in the month following:

Which said tract has been purchased by R. P. Price according to the provisions of the act of the Legislature of the state of Kansas, approved February 22, 1864, entitled an act to provide for the sale of school lands and acts amendatory. Now know ye that the state of Kansas in consideration of the premises and in conformity with the said acts of the Legislature of the state of Kansas has given and granted, and by these presents does give and grant, unto the said R. P. Price and to his heirs said tract above described. To have and to hold the same, etc., unto the said R. P. Rice and to his heirs and assigns forever.

The purchase was by Price and the grant to him and, though it is recited that Rice was to hold, etc., there can be no doubt but that title passed to Price. An affidavit

appears to have been made by one Smith that
3. **SAME:** mer-
chantable ab-
stract: defects. he was familiar with the transaction, that the patent was to Rice, and that the mistake was that of the recorder. But the laws of Kansas contain no provision for the correction of discrepancies in names and the like by affidavits, nor for the recording of these, and therefore the affidavit did not effect an amendment of the record. As the land was in a school section, it was not necessary to trace title of record beyond the state, but, as plaintiffs took under R. P. Rice through mesne conveyances, and title appeared of record in R. P. Price, the defect rendered the abstract of the record unmerchantable.

The United States District Court sits at Ft. Scott, the county seat of Bourbon county, Kan., and its judgments constituted liens on real estate in that county according to the

laws of that state and act of Congress, approved August 1, 1888. See *Bank v. Clark*, 55 Kan. 219 (40 Pac. 270) ; *Blair v. Ostrander*, 109 Iowa, 204. No certificate was attached to the abstract showing the land not subject (to) any liens of the United States courts.

Again, the abstract disclosed the existence of a mortgage securing an indebtedness of \$8,000, dated September 25, 1909, and another of \$400, of even date, and a third mortgage, dated

October 26, 1911, securing an indebtedness of \$500. The record then disclosed an incumbrance of \$8,900, instead of \$7,160, as stipulated in the contract. No explanation of this appears to have been made, though it subsequently appeared that the \$500 mortgage had been satisfied December 26, 1912, though not shown on the abstract, as it had been certified December 10th previous, and \$1,000 had been paid on the \$8,000 and \$140 on the \$400 mortgage. But defendants were entitled to some showing, other than Billick's word, of these partial payments, and none was given. Of course, partial payments of the incumbrances could not well be made to appear of record, and this was not essential. All necessary was that appropriate evidence thereof be supplied, such as the notes paid or receipts from the present holders of the incumbrance or statements by them, or something equally convincing. If this could not have been done, enough money to cover any possible contingency might have been deposited with a third person or bank, to be held subject to the production of such proof. But it was no part of defendants' obligation to propose either of these courses or arrange therefor. They might rely on the abstract. They were not advised that the incumbrances had been reduced in a manner which would have been deemed acceptable by a person of ordinary prudence. Other criticisms of the abstract need not be considered.

Two attorneys at law, who were and for many years had been engaged in the practice of their profession in Kansas, testified, over objection, that in their opinion the abstract did not disclose a merchantable title, citing defects to which we have reverted and others. The unwritten law of another state or foreign country may be so proven. *Banco De Sonora v. Banker's Mutual Casualty Co.*, 124 Iowa, 576. And the usage and practice under the written law of another state may also be shown by the evidence of those conversant therewith. *Grea-sons v. Davis*, 9 Iowa, 219; *Crafts v. Clark*, 38 Iowa, 237. Had the witnesses been so limited, there could be no doubt as to the competency of their testimony. Their ultimate conclusions, based on the facts and the law as to whether the abstract disclosed the kind of title exacted, however, were not competent as evidence. These were mere opinions or conclusions, and not testimony of facts, as is that of what the law or practice in a foreign state may be, and, like other conclusions deduced from provable facts, cannot be considered in aid of judgment by the court. *Brackenridge v. Claridge*, 91 Tex. 527 (44 S. W. 819, 43 L. R. A. 593). We agree with them in this instance, however, in saying that the defects mentioned rendered the abstract unmerchantable.

To put defendants in default, the burden was on plaintiffs to tender performance substantially as agreed. They undertook to furnish defendants at the time of the exchange of deeds "a merchantable abstract of title."

This was as essential as the tender of the deed or the difference to be paid and, though the making of requisitions with respect to defects in the abstract may be approved, they were not bound to do so, but might insist upon the submission of such an abstract as agreed upon as a condition precedent to performance. *Lessenich v. Sellers*, 119 Iowa, 314. Indeed this seems to have been contemplated, for the abstracts were to be submitted "at the time of the exchange of deeds."

6. FOREIGN LAWS
AND USAGES:
evidence: con-
clusion.

7. SPECIFIC PER-
FORMANCE: con-
ditions prece-
dent: tender.

Whether an abstract such as stipulated shall be furnished, independent of requisitions of the other side, depends on the condition in the contract, and not the kind of title to be exemplified, as seems to be thought by appellees; and, as the stipulation was that a "merchantable abstract of record" was to be furnished, and this was not done, plaintiffs were in default, and are not entitled to specific performance.—*Reversed.*

DEEMER, GAYNOR, and WITHROW, JJ., concur.

STATE OF IOWA, Appellant, v. THE UNITED STATES EXPRESS Co., Defendant, and THE HAMM BREWING COMPANY, Intervener, Appellees.

Intoxicating liquors: INTERSTATE SHIPMENT: NUISANCE: INJUNCTION:

1 **EXPRESS COMPANIES.** In view of what is known as the Webb-Kenyon Act of Congress, prohibiting the interstate shipment of intoxicating liquors intended by any person to be received, sold or used in violation of the law of the state to which shipped, a suit in equity will lie to enjoin an express company from transporting, delivering and distributing an interstate shipment of intoxicating liquors in a certain county, contrary to the statutes of this state.

Same: STATUTES: CONSTITUTIONALITY: PENALTY. A valid civil

2 statute, either state or federal, may be enacted without providing therein any penalty or sanction. If the penalty or sanction follows as a matter of course it need not be written out in the enactment itself. Thus the Webb-Kenyon Act of Congress which is remedial and not penal in character, is not void because containing no penal provision for its enforcement.

Interstate commerce: POWER TO REGULATE. The power to regulate

3 interstate commerce is delegated by the constitution exclusively to congress; it cannot be exercised by the states.

Same: CONSTITUTIONAL LAW: DELEGATION OF CONGRESSIONAL POWER.

4 The Webb-Kenyon Act prohibiting the importation of liquors into a state to be then used in violation of the state law, does not expressly delegate any power to the states to act for congress in

the matter of interstate commerce; but is rather prohibitory in character, acting upon articles of commerce and not upon the states, is complete in itself and either permissive in its nature or adoptive of the laws of the state, and is not unconstitutional as a delegation of congressional power.

Same: CONSTITUTIONAL LAW: EQUAL PROTECTION. The fact that the
5 Webb-Kenyon Act prohibits the shipment of liquors into a state to be used in violation of its laws is not an arbitrary and unjust classification, amounting to a denial of the equal protection of the law; as it is undoubtedly within the power of congress to prohibit some interstate shipments and to permit others.

Same: CONSTITUTIONAL LAW: SPECIAL PRIVILEGES. The Webb-Ken-
6 yon Act is uniform in its operation, and grants no special privileges or immunities to citizens of one state not possessed by others under the same circumstances.

Same: CONSTITUTIONAL LAW: DUE PROCESS. There is no absolute
7 right on the part of any one to sell liquor in any state. It is wholly a matter of police regulation; and the Webb-Kenyon Act neither gives nor protects such right. And in prohibiting the shipment into a state to be used in violation of its laws the act deprives no citizen of his property without due process.

Same: INTERSTATE COMMERCE: REGULATION OF LIQUOR TRAFFIC. The
8 manufacture, sale and transportation of liquor is subject to the police power inherent in the state, and may be regulated by the legislature in such reasonable manner as it may think best for the welfare of its citizens; and congress has power to prohibit the shipment of liquor into a state having a prohibitory law, thus taking it out of the sphere of interstate commerce when within such state, and thereby supplementing the state law.

Same: CONGRESSIONAL LEGISLATION: RE-ENACTMENT OF STATE LAW.
9 After the passage of the Webb-Kenyon law prohibiting the transportation of liquor into a state to be used illegally, thus divesting it of its character as an interstate shipment, it is not necessary for the state to re-enact its laws regulating the sale and transportation of liquor to make them effective.

Appeal from Wapello District Court.—HON. F. M. HUNTER,
Judge.

TUESDAY, FEBRUARY 17, 1914.

ACTION in equity to enjoin an alleged liquor nuisance; to enjoin defendant from distributing or delivering intoxicating liquors, or aiding in the distribution or delivery thereof, contrary to law, from transporting, conveying, and carrying, or distributing liquors, either in cars, wagons, or otherwise, contrary to law, in Wapello county, Iowa, or in the judicial district in which said county is located; for attorney's fees, etc. The defendant answered, pleading in substance that it is a common carrier, engaged in interstate commerce; that all that it did, or was charged with doing, was shipping intoxicating liquors in interstate commerce, without knowledge of any unlawful intent on the part of the consignee. It also pleaded that it did not violate any of the laws of this state or of Congress, and that, if said laws are so construed as to make their acts illegal, they are in violation of the Constitution of the United States, and of the state of Iowa. The Hamm Brewing Company, a corporation organized under the laws of, and doing a brewing business in, the state of Minnesota, intervened, claiming that it was engaged in the manufacture and sale of intoxicating liquors, in interstate commerce; that such business is lawful, and that it was using the express company as a means for doing its business; that it was making sales to different persons in many states, to individuals for their own personal use, as well as for sale after delivery to them. They also pleaded the unconstitutionality of the laws of this state and of Congress, particularly if they be held to prohibit the sale and delivery to a common carrier of intoxicating liquors for transportation to a nonresident of the state in which they do business, and for the consignee's own personal use. The case was tried to the court on these issues, resulting in a decree dismissing plaintiff's petition, and the appeal is from that decree.—*Reversed and Remanded.*

George Cosson, Attorney General, L. H. Salinger, Chester W. Whitmore, C. A. Robbins, and George L. Gillies, for the State.

Parker, Parrish & Miller (Lawrence Maxwell and Joseph S. Graydon, on the brief), for appellee United States Express Co.

E. R. Mitchell, (Lawrence Maxwell and Joseph S. Graydon, on the brief), for appellee Hamm Brewing Co.

DEEMER, J.—The nature of the action as indicated by the prayer of the petition has already been stated; but to fully understand the case, it is deemed advisable to quote some of the allegations of that petition. They are, in substance, as follows: “That the defendant, the United States Express Company, is and was at all the times hereinafter mentioned a corporation possessed of and using certain cars which it leases and also possessing certain horses and wagons, and was a common carrier for hire, carrying goods, wares, and merchandise to and from the city of Ottumwa, Wapello county, Iowa, over the line of railway used and operated by the Chicago, Rock Island & Pacific Railway Company. That upon the arrival of said goods, wares, and merchandise in the said city of Ottumwa, the defendant uses said horses and wagons in delivering the said goods, wares, and merchandise to the consignees thereof in said city, hauling the same through the streets and alleys of said city. That for many weeks since March 4, 1913, and prior to the institution of this action, defendant has been, and still is, engaged in transporting, conveying, delivering, and aiding in delivering and distributing to persons in said city of Ottumwa and county of Wapello, large quantities of intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county of Wapello

and state of Iowa, aforesaid. That a very large part or portion of the persons to whom said intoxicating liquors are conveyed and delivered, thereafter sell, barter, and deliver the same in violation of the prohibitory laws of the state of Iowa, and that defendant well knows this to be a fact. That in so transporting, conveying, delivering, and aiding in delivering and distributing the intoxicating liquors as aforesaid the defendant uses said cars, horses, wagons, and office. That by reason of the premises the said cars, horses, wagons, and office so used in transporting, conveying, delivering, and distributing the intoxicating liquors as aforesaid, and in aiding in delivering and distributing the same, constitute a nuisance, and the defendant has established and is using and maintaining a nuisance." We do this to show that this is not a criminal proceeding or an action to enforce a penalty under section 2419 of the Iowa Code of 1897. The plaintiff in its pleading seems to place some reliance upon that section, doubtless to show that the act of transporting liquor after it is brought into this state in interstate commerce is interdicted by our law, and in doing these acts it was unlawfully handling liquors, or aiding and abetting others therein for the reason that the handling of liquor in this state is unlawful, and that all who aid or abet therein are guilty of a nuisance, and may be enjoined in a civil proceeding. So much for the issues.

The case was tried upon a stipulation, and certain concessions of fact, supplemented by some oral testimony, and the trial court made the following, among other, findings of fact:

The provisions of the mulct law contained in the statutes of Iowa have not been in force in Ottumwa at any time on or since March 4, 1913. That on March 14, 1913, the defendant received from the Hamm Brewing Company of Rock Island, Ill., at its (the defendant's) office at Rock Island, Ill., one case of beer consigned to J. Erbacher at Ottumwa, Iowa, and that it transported the case of beer from Rock Island, Ill., to Ottumwa, Iowa, and there delivered the same to said J.

Erbacher, consignee, on the 21st day of March, 1913, who receipted therefor and paid the defendant the regular tariff rate thereon. That on various dates since March 14, 1913, the defendant received at its office in Rock Island, Ill., from the same consignor consigned to the same consignee, at Ottumwa, Iowa, divers cases of beer, which it transported and delivered to the consignee in like manner and effect as the shipment made March 14, 1913. That in each instance of shipment above referred to, the consignors were lawfully engaged in the sale and shipments of intoxicating liquors at Rock Island, Ill., and the consignees, respectively, purchased the beer and liquors from the respective consignors, and paid for the same at Rock Island, Ill., and that each of said purchases and sales were lawful in so far as concerns the laws of the state of Illinois. That in each of the shipments of beer and liquors referred to, the cases and packages were marked and labeled in all respects in conformity with law, were shipped by continuous carriage from Rock Island, Ill., to Ottumwa, Iowa, and there delivered to the consignees, and that the defendant company had no title to or interest in said beer and liquors or any part thereof, except as a carrier for hire and the legal tariff shipping rates thereon. That during the time ever since March 4, 1913, said J. Erbacher had and possessed a residence in Ottumwa, Iowa, but did not have or possess a place where he engaged in lawful business; and during all of that time he had no right to keep with intent to sell, or sell, intoxicating liquors in Iowa to any person or for any purpose whatsoever, and that the beer and liquors delivered to J. Erbacher by the defendant were not delivered to him at his residence or any established place of lawful business in Ottumwa, Iowa, but elsewhere in said city; and these facts were well known to the defendant at the time of the delivery, by it, of the beer and liquors above mentioned. I further find that at the time, and each of the times, that J. Erbacher purchased the liquors above mentioned, and during the time they were being transported and delivered to him, and after they were delivered to him, he was the sole person interested therein, and he intended, all of the time, to receive and possess with intent to sell the beer and liquors in Ottumwa, in violation of the laws of the state of Iowa. That his purpose and intent in the purchase, possession, and use of the liquors from the time of purchase was made, and while being transported, and as long as the liquors were in his

custody and control, was to sell the same in violation of the laws of the state of Iowa. The defendant at the time of the delivery of the beer and the liquors to J. Erbacher did not have notice or actual knowledge that he was buying or receiving the same with the intent and purpose of selling it in violation of law, but was in possession of such facts that, upon reasonable inquiry, it would have ascertained he was buying and receiving and holding the beer and liquor with intent to sell the same in violation of the laws of Iowa, and is therefore chargeable with such knowledge.

These findings of fact are not challenged by any of the parties to the controversy, and we need only say in this connection that, in so far as this case is concerned, the question of purchase and shipment to a consignee for his own personal use is entirely eliminated, as was the question of the criminal liability of either the defendant or the intervener. The findings of fact, even if challenged, have sufficient support in the testimony, and we accept them as correct.

I. It is also conceded, as we understand, that in virtue of our prohibitory law, and the procedure provided for the enforcement thereof, this action in equity would lie as against

1. INTOXICATING
LIQUORS: in-
terstate ship-
ment: nul-
lity: injunc-
tion: express
companies.

the defendant express company, were it not for the fact that what it did, and was charged with doing, was in its capacity as a common carrier, engaged in interstate commerce. In the absence of such a concession, we should find as a matter of law that such an action will lie, under section 2382 of the Code Supplement of 1907, sections 2384 and 2405 of the Code, section 2406 of the Code Supplement, sections 2419, 2427, and 2431 of the Code, and sections 2461-a and 2461-b of the Code Supplement. These read as follows:

Section 2382 (Suppl.):

No one, by himself, clerk, servant, employee or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the pur-

chase of any property or of any services or in evasion of the statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous, and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employee or agent engaged or aiding in any violation of this chapter, shall be charged and convicted as principal. Provided, that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors, from persons legally authorized to sell or dispense the same.

Code, section 2384:

Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture or sale or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents, are also declared a nuisance, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided.

Code, section 2405:

Whenever a nuisance is kept, maintained or exists, as defined in this chapter, any citizen of the county may maintain an action in equity to perpetually enjoin and abate the same. In such action the court, or a judge in vacation, shall,

upon the presentation of a petition therefor, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the court or judge, by evidence in the form of affidavits, depositions, oral testimony or otherwise, as the plaintiff may elect, unless the court or judge, by previous order, shall have directed the form and manner in which it shall be presented, that the nuisance complained of exists. Three days' notice in writing shall be given the defendant of the hearing of the application, and, if then continued at his instance, the writ as prayed shall be granted as a matter of course. When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued, and any violation of the provisions of this chapter by manufacturing, selling or keeping for sale of intoxicating liquors anywhere in said district shall be punished as a contempt, as provided in this chapter.

Section 2406 (Supl.):

Actions to enjoin nuisances may be brought in the name of the state by the county attorney, who shall prosecute the same to judgment, or any citizen of the proper county may institute and maintain such a proceeding in his name. The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given; and in such action evidence of the general reputation of the place described in the petition shall be admissible for the purpose of proving the existence of such nuisance. If the plaintiff is successful in the action, an attorney's fee of twenty-five dollars shall be taxed as costs in his favor.

Code, section 2419:

If any express or railway company, or any common carrier, or person, or any one as the agent or employee thereof, shall transport or convey to any person within this state any intoxicating liquors, without first having been furnished with a certificate from the clerk of the court issuing the permit, showing that the consignee is a permit holder and authorized to sell liquors in the county to which the shipment is made,

such company, common carrier, person, agent or employee thereof, shall, upon conviction, be fined in the sum of one hundred dollars for each offense and pay the costs of prosecution including a reasonable attorney's fee to be taxed by the court. The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. The defendant in a prosecution under this section may show by a preponderance of the evidence as a defense that the character, circumstances and contents of the shipment were not known to him, or that the person to whom the shipment was made had complied with the provisions of this chapter relating to the mulct tax.

Code, section 2427 :

In all actions, prosecutions and proceedings under the provisions of this chapter, proof of the actual manufacture, sale or gift in evasion of the statute of intoxicating liquors by a person not authorized to manufacture, sell or give the same shall be presumptive evidence of illegal manufacture or sale, and the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling house which does not include or is not used in connection with a tavern, public eating house, restaurant, grocery, or other place of public resort, or the finding of the same in unusual quantities in a private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery, or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale. The fact that any person not authorized to keep for sale and to sell intoxicating liquors for lawful purposes, engaged in any kind of business, has or keeps posted in or about his place of business a receipt or stamp showing payment of the special tax levied under the laws of the United States upon the business of selling distilled, malted or fermented liquors, or shall have paid such special tax for the sale of such liquors in this state, shall be presumptive evidence that the person owning or controlling such receipt or stamp, or having paid such special tax, is engaged in keeping

for sale or selling intoxicating liquors contrary to the provisions of this chapter.

Code, section 2431:

Courts and jurors shall construe this chapter so as to prevent evasion.

Section 2461-a (Suppl.):

Any person who shall, by himself, or his employee, servant or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, in violation of law, shall be termed a bootlegger.

Section 2461-b (Suppl.):

Every such bootlegger may be restrained by injunction from doing or continuing to do any of the acts prohibited by law, and all the proceedings for injunctions, temporary and permanent, and for fines and costs for violation of same, as defined by law, shall be applicable to such person, company or corporation, and the fact that an offender has no known or permanent place of business or base of supplies, or quits the business after the commencement of an action shall not prevent a temporary or permanent injunction, as the case may be, from issuing.

Again, it must be conceded that, before the passage by Congress of what is known as the Webb-Kenyon Act (Act March 1, 1913, chapter 90, 37 Stat. 699), plaintiff's action would not have lain, for the reason that the shipment and sales in question, being in interstate commerce, were beyond and outside of state legislation because under the federal Constitution such power—that is, the regulation and control of interstate commerce—is, generally speaking, exclusively vested

in Congress. But Congress in passing the Webb-Kenyon Act referred to has acted, and the ultimate question here is, first, the nature of the enactment, and, second, the constitutionality thereof. It was passed over the President's veto, March 1, 1913, and reads as follows:

An act divesting intoxicating liquors of their interstate character in certain cases. Be it enacted, etc., that the shipment or transportation in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act. It does just what the title says it was intended to do, to wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and substance of the act, and that it has reference to such shipments as are involved in this case clearly appears.

As already suggested, we have no reason at this time to consider the question of the criminal liability of the defendant under any of the laws of this state, and, as the act of Congress attaches no penalty, there is, of course, no criminal liability under that act. So much as to the interpretation of the act.

II. We are next brought directly to the real and, to our minds, the only question in the case, and that is the legality and constitutionality of the act. As it is suggested in some of the briefs that while Congress has apparently acted, and provided a rule of action, yet that as the act has no penalty, and there is no sanction, there is in fact no law; we may as well dispose of that proposition at the outset of the discussion reserved for this paragraph of the opinion.

2. SAME: statutes: constitutionality: penalty.

While the term "law" is generally understood, and is quite generally defined, as "a rule of civil action prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong," there has been a good deal of discussion as to whether such rule is of any force or effect unless there be a penalty, or sanction, affixed. But we regard much of this discussion as academic, and are persuaded that either the Congress or the Legislature may make a perfectly valid statute a rule of action, without providing any penalty or sanction. True, a criminal statute which does not prescribe any punishment is without validity; but a great body of our statutory laws has no penalty or sanction attached. For instance, a statute may in terms make certain acts a nuisance, and, if it does so, there is no need to provide the means for enforcement unless the acts are to be made criminal, for a court of chancery, if not a court of law, has the means at hand whereby to make the act effective. Indeed, the best short definition of "statutory law" with which we are familiar is that "it is the written will of the Legislature (which of course includes Congress) solemnly expressed by the forms necessary to constitute it a law of the state." 2 Bouvier's

Law Dictionary, page 543. If the sanction or penalty follows as a matter of course, there need not be any written in the enactment itself. There are, or may be, four parts of a law, to wit: Declaratory, directory, remedial, and vindicatory. The act in question not being penal in character, it needs no vindicatory part. Constitutional provisions, which are the highest forms of law, generally have no sanction or penalty, and no one has heretofore suggested that any is required, even where prohibitions are contained therein. Again, the statute in question is clearly declaratory or remedial (to supply defects or to abridge superfluities), as distinguished from a penal one. *Freeland v. McCullough*, 1 Denio (N. Y.) 422 (43 Am. Dec. 685). Our conclusions as to the validity of the statute as such have support in the following case: *Green v. Penzance*, 6 App. Cas. 617 (45 L. T. Rep. (N. S.) 353).

III. Assuming that the enactment in question is a statute, the other points made against it relate to its constitutionality, and these are substantially as follows:

First. The Webb-Kenyon law is contrary to and in contravention of section 1 of article 1 of the Constitution of the state of Iowa, which among other things provides that all men have the inalienable right of acquiring, possessing, and protecting property, and is contrary to and in contravention of section 9 of said article 1 of the Constitution of the state of Iowa, which among other things provides that no person shall be deprived of life, liberty, or property without due process of law, and that any injunction granted in this cause would be void as in violation of the said provisions of the Constitution of the state of Iowa.

Second. That the Webb-Kenyon law and the Iowa statutes and each of them are void, in that they are contrary to and in contravention of the Constitution of the United States, and particularly section 8, article 1 thereof, which among other things provides that Congress shall have power to regulate commerce with foreign nations and among the several states, and to make all laws which shall be necessary and proper for

carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States; and section 2, article 4 thereof, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; and article 6 thereof, providing that the Constitution of the United States and the laws which shall be made in pursuance thereof are and shall be the supreme law of the land; and article 5 of the Amendments to the Constitution of the United States, which among other things provides that no person shall be deprived of liberty or property without due process of law; and section 1, article 14, of the Amendment to the Constitution, providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Third. That the said so-called Webb-Kenyon law is contrary to and in contravention of the said provisions of the Constitution of the United States, in this, that it purports to delegate to the several states, and among others the state of Iowa, the right and power to regulate, interfere with, and prohibit interstate commerce in intoxicating liquors.

Fourth. That the so-called Webb-Kenyon law is contrary to and in contravention of the Constitution of the United States, in that it purports to authorize and sanction as many different systems of regulation of interstate commerce in intoxicating liquors as there are states of the United States, and that the said statute does not provide for a uniform regulation of said interstate traffic throughout the United States and give to the citizens thereof the equal protection of the law.

Fifth. That the said so-called Webb-Kenyon law is contrary to and in contravention of the provisions of the federal Constitution above set forth, in this, that it purports to authorize and permit the laws of the state of Iowa in relation to traffic in intoxicating liquors to have an extra-territorial effect,

and to operate beyond the borders of the state of Iowa as the supreme law of the land to interfere with and regulate interstate commerce in intoxicating liquors originating in states other than Iowa, and terminating in Iowa.

Sixth. That the said so-called Webb-Kenyon law, construed in connection with the said Iowa statutes, is contrary to and in contravention of the said provisions of the Constitution of the United States, in that it purports to give to the state of Iowa power to interfere with and to prohibit the making of contracts in other states between citizens and residents of such other states and citizens and residents of the state of Iowa for the purchase and sale of intoxicating liquors in such other states where such contracts are lawful, and for the delivery in the state of Iowa to the said purchaser thereof at his residence in the state of Iowa.

Seventh. That the said so-called Webb-Kenyon law, construed in connection with said Iowa statutes, is contrary to and in contravention of the said provisions of the Constitution of the United States, in that it purports to give to the state of Iowa power to interfere with and prohibit the making of contracts in other states between this defendant and persons lawfully engaged in the manufacture or keeping for sale, and sale and shipment, of intoxicating liquors in said states for the interstate carriage and transportation by this defendant into the state of Iowa of said intoxicating liquors and the delivery thereof in interstate commerce to the consignee thereof in the state of Iowa.

Eighth. That the said so-called Webb-Kenyon law, construed in connection with the statutes of the state of Iowa, is contrary to and in contravention of the Constitution of the United States, in that it purports to authorize and empower the state of Iowa to interfere with and prevent the delivery by this defendant in interstate commerce to consignees in the state of Iowa of intoxicating liquors lawfully received by this defendant in other states for transportation and there law-

fully contracted to be transported and delivered by this defendant to the consignee thereof residing in the state of Iowa.

Ninth. That the said so-called Webb-Kenyon law, construed in connection with the statutes of the state of Iowa, is contrary to and in contravention of said provisions of the Constitution of the United States, and especially article 3 of said Constitution, in that it purports to prescribe as a regulation of interstate commerce that this defendant, through its agents, shall determine, in advance of the delivery of an interstate consignment of intoxicating liquors to the consignee in the state of Iowa, whether or not it is, or may be, the intention of such consignee to receive, possess, use, or sell such intoxicating liquor in violation of Iowa law, and to interfere with interstate commerce by refusing to perform defendant's contract lawfully made in another state of the United States to transport and deliver said liquor to the said consignee in the state of Iowa, and to interfere with and prevent the performance of the contract made in interstate commerce between the consignor and the consignee of said intoxicating liquors in the event of its being or being believed to be the intention of such consignee to receive, possess, use, or sell such consignment of intoxicating liquors in violation of the laws of the state of Iowa.

Tenth. That by reason of the premises, any decree of this court in this cause granting an injunction against this defendant in any respect as prayed would be void as in contravention of and contrary to the Constitution of the United States in the following among other respects, namely:

(a) It would be a regulation of an interference with interstate commerce by a court having no jurisdiction to interfere with or to regulate interstate commerce.

(b) It would be giving extra-territorial effect to the laws of the state of Iowa, in that it would amount to a nullification of contracts made in another state and lawful under the laws of the state where made, by and between a consignor and a consignee of intoxicating liquors.

(c) It would deprive the several consignees of the said shipments of intoxicating liquors hereinbefore referred to of their liberty guaranteed to them by the provisions hereinbefore quoted of the Constitution of the United States and the amendments thereof, to have transported to them in interstate commerce for their personal use in the state of Iowa, a legitimate article of interstate commerce as recognized and defined by the laws of the United States and of the commercial world, namely, beer and other intoxicating liquors.

(d) It would give extra-territorial effect to the laws of the state of Iowa, in that it would amount to a nullification of lawful contracts for interstate transportation lawfully made in the state of Illinois between the defendant, the United States Express Company, and the consignor of said intoxicating liquor, for the interstate transportation of said intoxicating liquors by the defendant, the United States Express Company, and would submit this defendant to liability for damages and penalties for failure and refusal to carry beer and other intoxicating liquors as a lawful subject-matter of interstate commerce when lawfully tendered for shipment into the state of Iowa by persons and corporations lawfully dealing in and selling and shipping intoxicating liquors, in states of the United States other than the state of Iowa.

(e) It would be an interference with the performance of contracts made in interstate commerce, by a court of the state of Iowa, under the laws of the state of Iowa, in relation to a subject-matter of interstate commerce over which the Congress of the United States and the courts of the United States alone have jurisdiction.

(f) It would be a regulation of interstate commerce by the state of Iowa.

(g) It would be based upon the requirement that this defendant should exercise the exclusive function of Congress and of the courts of the United States to regulate and enforce the regulation of interstate commerce.

These claims are somewhat involved, and out of an abund-

ance of caution they of necessity overlap, and as a result it will be necessary to reduce them to their lowest terms, in order to have any intelligent comprehension of the matter to be decided. Nothing is lacking in the arguments presented, and from them we are enabled to gather the exact propositions involved.

The transactions involved were in interstate commerce, and if Congress had not acted, under its power derived from the Constitution itself, there could be no doubt of the propo-

3. **INTERSTATE
COMMERCE:
power to regu-
late.** sition that the state laws would be inoperative, because the state itself cannot regulate interstate commerce, even in the exercise of its police power; and the ultimate question here is: Has Congress, in virtue of its power over interstate commerce, acted in the premises, and, if so, is its enactment valid?

The first and only serious contention, as we view it, is whether or not the Webb-Kenyon act is complete in itself, or is it simply a delegation of power to the state to act for Con-

4. **SAME: consti-
tutional law:
delegation of
congressional
power.** gress in the matter. If the latter, then the act cannot be sustained. It will be observed at the outset that save for the want of a penalty or sanction in the act itself, as already pointed

out, the act is complete in itself, and that, according to many decisions which might be cited, it is uniform in its operation; that is, that it applies alike to all similarly situated, and, of necessity, to all who may, in the future, come within its provisions. There can be no doubt that the Congress, in virtue of its power over interstate commerce, might, in its discretion, put its ban upon all transportation of liquors in interstate shipment, just as it has done with lottery tickets, the shipment of liquors to Indians, the method of shipment of liquor by express companies, the shipment of game, the carriage of infected live stock, the white slave traffic, etc. All of these and other like acts were passed to aid states which came within their provisions in the enforcement of local laws which they deemed of vital importance to their

citizens; in other words, to aid them in the enforcement of their police regulations. The act simply removes the bar theretofore existing to the enforcement of police regulations, because of the interstate character of the transaction; and, if it be within the power of the Congress to forbid the shipment of all liquors in interstate traffic, no logical reason is perceived why it may not do less, and forbid the shipment under certain conditions.

There are no words of delegation in the act itself, and the theory of it undoubtedly is that liquors intended for use, contrary to state rules, should be an outlaw of interstate commerce, and neither the shipper nor the carrier may say that the state is interfering with interstate commerce, for the reason that the right of such shipments between the states is denied by federal legislation. It is true that the effect of the act is to give the states more power, but there is no such express delegation, and the language of the act is in no sense permissive. The act is prohibitory in character, and acts not upon states, but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation.

The principles announced in *State of Iowa v. Forkner*, 94 Iowa, 1, are applicable here, particularly the discussion on pages nine to seventeen, inclusive. From the earliest history of the country, Congress has, in the exercise of its legitimate function, given force and effect to state laws. In the year 1803, and while Mr. Jefferson was President, Congress passed a law forbidding the transportation of free negroes from one state to another where they were not permitted by the laws of the state to reside. 2 Stat. Law, 205, Act of Feb. 28, 1803, chapter 10. The white slave act forbids the transportation of women for immoral purposes, and these immoral purposes may be defined by state laws. See *Hoke v. U. S.*, 227 U. S. 308 (33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913-E, 905). The

Lacey act forbids the transportation in interstate commerce of game killed in violation of local laws. Crim. Code, section 242 (Act March 4, 1909, chapter 321, 35 Stat. 1137 (U. S. Comp. St. Supp. 1911, page 1663). And the Wilson act had the effect of making state laws apply to liquor shipped to be sold in original packages. Most, if not all, of these acts have been directly sustained by court decisions. See *Rupert v. U. S.*, 181 Fed. 87 (104 C. C. A. 255); *Silz v. Hesterberg*, 211 U. S. 31 (29 Sup. Ct. 10, 53 L. Ed. 75); *In re Rahrer*, 140 U. S. 545 (11 Sup. Ct. 865, 35 L. Ed. 572). Again, the judiciary act of 1789 expressly provided "that the laws of the several states shall be rules of decision in trials at common law in the courts of the United States, in cases where they apply." Act Sept. 24, 1789, chapter 20, 1 Stat. 73. And this has always been regarded as a legitimate exercise of federal power, and not a delegation of power. See *Golden v. Prince*, Fed. Cas. No. 5,509. And nothing was found objectionable in this because the states, or some of them, might in the future change their rules of practice. Other instances might be cited, but these are deemed sufficient. See, however, a discussion of the subject in a learned article by James D. Barnett, in 2 Am. Political Science Review, page 347.

We may as well close this part of the discussion by quoting the following from *In re Rahrer, supra*:

In the case at bar, petitioner was arrested by the state authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the state. The act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the state laws to the same extent and in the same manner as though the liquors had been produced in the state; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the laws of the state, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the state had been passed in the exercise

of its police powers, and applied to the sale of all intoxicating liquors whether imported or not; there being no exception as to those imported, and no inference arising, in view of the provisions of the state Constitution and the terms of the law (within whose mischief all intoxicating liquors came), that the state did not intend imported liquors to be included. We do not mean that the intention is to be imputed of violating any constitutional rule, but that the state law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause. Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the act of Congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the state; nor can we perceive that the congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power, exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

In *Gibbons v. Ogden*, 9 Wheat 1 (6 L. Ed. 23), it appeared that Congress passed an act providing that: "Until further provision is made by Congress, all pilots . . . shall continue to be regulated in conformity with the exist-

ing laws of the states respectively wherein such pilots may be, or with such laws as the states respectively may enact for the purpose." Chief Justice Marshall, in speaking of the validity of this act, said:

Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act . . . adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the states, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. . . . The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary . . . shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

This act and the acts recognizing the validity of state health laws, and certain other acts, he thinks show an opinion of Congress "that the states retain powers enabling them to pass the laws to which allusion has been made."

See, also, to the same effect, *Cooley v. Board of Wardens*, 12 How. 299 (13 L. Ed. 996); *The Panama*, Fed. Cas. No. 10,702; *The Clymene* (D. C.) 9 Fed. 164; *Opinion of the Justices*, 22 Pick. (Mass.) 571; *Van Allen v. Assessors*, 3 Wall. 573 (18 L. Ed. 229); *New York v. Weaver*, 100 U. S. 539 (25

L. Ed. 705) ; *Farmers' Bank v. Dearing*, 91 U. S. 29 (23 L. Ed. 196) ; *Ex parte Jervey* (C. C.) 66 Fed. 957 ; *Bowman v. Railroad*, 125 U. S. 465 (8 Sup. Ct. 689, 1062, 31 L. Ed. 700) ; *Schollenberger v. Pennsylvania*, 171 U. S. 1 (18 Sup. Ct. 757, 43 L. Ed. 49) ; *Blair v. Ostrander*, 109 Iowa, 204 ; *Central Pac. R. R. v. Nevada*, 162 U. S. 512 (16 Sup. Ct. 885, 40 L. Ed. 1057) ; *Hanover Bank v. Moyses*, 186 U. S. 181 (22 Sup. Ct. 857, 46 L. Ed. 1113) ; *Morgan v. Board of Health*, 118 U. S. 455 (6 Sup. Ct. 1114, 30 L. Ed. 237).

Apt quotations might be made from each and all of these cases, which hold that such an act as the one before us is either permissive in its nature, or adoptive of the laws of the states, and that in either event there is no delegation of power to the states. It will be noticed too, in reading these cases, that the objection that there might be as many rules as there were different states, met with no favor, and was either held to be without merit or entirely disregarded.

We may well quote in closing this part of the discussion, from the remarks of Senator Hoar, in discussing the Wilson act (Act Aug. 8, 1890, chapter 728, 26 Stat. 313, U. S. Comp. St. 1901, page 3177) when it was before the Senate of the United States, as follows: "Congress may say the power to engage in interstate or international commerce shall not be understood as permitting anybody to sell opium or intoxicating liquors to any one else, and that they shall be excluded altogether from the domain of interstate commerce. That Congress has a right to say. . . . That is not a question of delegated power. It is not a question of permission to the state. It is a question of the right of Congress to prescribe what shall be the limit of interstate commerce."

This is a very clear statement of the rule, and to our minds leaves nothing to the argument that the act in question is a delegation of power to the state.

IV. It is said, however, that the act denies the equal protection of laws in that it does not apply to all alike; that,

if the act had forbidden the shipment of all liquors in interstate commerce, it might be valid, but that, as

5. SAME: constitutional law: equal protection.

it does not do so, it gives privileges and immunities to some persons not possessed by others. This too is fallacious, in that it overlooks the undoubted right of Congress to prohibit some shipments in interstate commerce and to permit others. The real question here is: Is the classification arbitrary, and unjust, and based upon no substantial difference? The classification is manifestly just, or at least it is not arbitrary. It applies to all in a like situation. Congress has passed acts forbidding the interstate shipment of adulterated foods, of falsely labeled food, of obscene literature, of explosives, of diseased cattle, of women under certain conditions; of commodities owned by railroads other than lumber; has declared intoxicating liquors nonmailable; prohibited C. O. D. shipments of liquor, and the false marking of packages containing liquor. But more important still, the Supreme Court of the United States has upheld a state statute prohibiting the shipment in intrastate commerce, from a wet county in the state into a dry one. *Louisville & N. R. R. v. Cook*, 223 U. S. 70 (32 Sup. Ct. 189, 56 L. Ed. 355). This decision, to our minds, determines the problem now before us.

V. That the law is uniform in its operation is hardly debatable; and that it gives privileges and immunities to citizens of one state, not possessed by others under the same

6. SAME: constitutional law: special privileges.

circumstances, is wholly without merit. The act grants no privileges or immunities, and is not subject to this objection lodged against it.

Butte Co. v. Baker, 196 U. S. 119 (25 Sup. Ct. 211, 49 L. Ed. 409); *Delamater v. South Dakota*, 205 U. S. 93 (27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733); *In re Rahrer, supra*; *Friedman case*, 191 Fed. 682 (112 C. C. A. 219); *State v. Grier* (Del.) 88 Atl. 579; *Crowley v. Christensen*, 137 U. S. 86 (11 Sup. Ct. 13, 34 L. Ed. 620); *Mugler v. State of Kansas*, 123 U. S. 623 (8 Sup. Ct. 273, 31 L. Ed. 205); *Railway v. U. S.*

231 U. S. 363 (34 Sup. Ct. 65, 58 L. Ed.—) ; *Buttfield v. Stranahan*, 192 U. S. 470 (24 Sup. Ct. 349, 48 L. Ed. 525) ; *Hanover Bank v Moyses*, 186 U. S. 181 (22 Sup. Ct. 857, 46 L. Ed. 1113).

There is no absolute right to sell liquors in any state. That is a matter of police regulation, and the act of Congress neither gives nor protects that right. In *Crowley v. Christensen*, 137 U. S. 86 (11 Sup. Ct. 13, 34 L. Ed.

7. SAME: constitutional law: due process.

620), the Supreme Court of the United States said: "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors . . . has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. . . . The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." See, also, *Mugler v. Kansas*, 123 U. S. 623 (8 Sup. Ct. 273, 31 L. Ed. 205) ; *Kidd v. Pearson*, 128 U. S. 1 (9 Sup. Ct. 6, 32 L. Ed. 346).

It is manifest, of course, that under the act no one is deprived of his property without due process of law. *Eilenbecker v. Dist. Court*, 134 U. S. 31 (10 Sup. Ct. 424, 33 L. Ed. 801) ; *Barbier v. Connolly*, 113 U. S. 27 (5 Sup. Ct. 357, 28 L. Ed. 923).

We cannot better close this discussion than to quote the following from the Supreme Court of Delaware, found in *State v. Grier*, 88 Atl. 602 *et seq.*:

The history of legislation, as well as of decisional law, upon the subject, is interesting. The 'License Cases' held that

the sale of interstate intoxicating liquor might be prohibited by the state even in the absence of a federal law. Subsequently the Supreme Court decided that the state could not prevent such sale in original packages. Later the Wilson act was passed, and the court held it to be constitutional, and that it gave the state the right to prohibit the sale of an interstate shipment of intoxicating liquor, even in the original package, after arrival at destination.

8. SAME: inter-
state com-
merce: regula-
tion of liquor
traffic.

That was the purpose and extent of the Wilson act, as interpreted by the Supreme Court. The Webb-Kenyon act was passed to supply the deficiency in the Wilson law, and make the transportation, as well as the sale, of interstate intoxicating liquors subject to state law. Such a law was necessary to give the state the right to prevent a traffic in an article which the Legislature believed to be detrimental to the health and welfare of its citizens. We think the federal statute should be broadly and reasonably construed, so as to protect the state in the exercise of such right, and we further think that such a construction would not be in conflict with the principle of any decision heretofore made by the Supreme Court, under the commerce clause of the Constitution of the United States. Indeed, we are satisfied that such a construction would be in harmony with the principle and reasoning of all the decisions of said court upon the subject since the passage of the Wilson act.

There can be no doubt that under the decisions of the Supreme Court, the following principles may be regarded as fully established:

(1) That the police power is inherent in the state, and is given a scope and exercise within the state commensurate with what the Legislature reasonably believes to be necessary for the protection and preservation of the health, morals, and welfare of the citizens.

(2) That the manufacture and sale of intoxicating liquor is a subject of police regulation by the state.

(3) That the state may, in the *bona fide* exercise of its police power, make unlawful the manufacture, sale, and transportation of intoxicating liquor, as injurious to the health and safety of its inhabitants, and that by an act of Congress such liquor can be divested of its interstate commerce character sooner than would otherwise be the case.

Therefore we think it logically and necessarily follows

that Congress has the power to prohibit the shipment of intoxicating liquor into a state having such law, and by such prohibition the article is taken out of the sphere of legitimate interstate commerce within the state.

In other words, Congress may, under its power to regulate commerce between the states, supplement, and in effect ratify, the prohibitory laws of the state, by extending the prohibition to interstate shipments.

In the *Lottery Case*, reported in 188 U. S. 358, 360, 361 (93 Sup. Ct. 321, 329, 47 L. Ed. 492), it was held that the carriage of lottery tickets from one state into another, by independent carriers, is interstate commerce, and may be prohibited by an act of Congress; and in the course of its opinion the court said: 'So that we have in the *Rahrer* case a recognition of the principle that the power of Congress to regulate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.' To the same effect is *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 24, 40 (25 Sup. Ct. 552, 49 L. Ed. 925), in which the court agreed with the reasoning in the *Rahrer* case.

In *Foppiano v. Speed*, 199 U. S. 517 (26 Sup. Ct. 138, 50 L. Ed. 288), the validity of a state license for sales of intoxicating liquors on ferryboats running from one state to another was sustained.

The case of *Plumley v. Massachusetts*, 155 U. S. 474 (15 Sup. Ct. 161, 39 L. Ed. 223), sustained the prohibition of the sale of oleomargarine not colored yellow, although it was imported. In that case the court said: 'The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, the health, and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national Constitution,' etc.

The prohibition of the transportation of intoxicating liquor is considered, when supplemented and reinforced by an act of Congress, as taking from intoxicating liquors their character of interstate commerce, and placing them in the same category as lottery tickets, oleomargarine, deleterious drugs, the interstate transportation of which may unquestionably be prohibited.

We are fully convinced that when a state seeks by positive law, enacted in the fair and reasonable exercise of the police power, to prohibit the manufacture and sale of intoxicating

liquors within its limits, and in order to make such law more effective seeks to regulate the transportation of such liquors by prohibiting the bringing or carrying of the same into its local option territory by common carriers and liquor dealers, such transportation being substantially connected with the forbidden sale, and also prohibited by an act of Congress, the state legislation should and can be sustained under both state and federal Constitutions. In view of the wide latitude accorded to the states in the exercise of the police power, we cannot see how such protection can be denied when the state law is supplemented and reinforced by an act of Congress which was clearly designed to give such protection. And, moreover, it is difficult to see why the conclusion we have reached is not fully sustained by the reasoning of the court in *Re Rahrer* to which we have already referred, and which is not in conflict with any other Supreme Court case. We regard that authority as more in point than any other because it comes nearer to a determination of the crucial question involved in the present case.

The opinion was delivered by Mr. Fuller, then Chief Justice, the question before the court was the constitutionality and effect of the Wilson act, and we quote from the decision the following language as being directly in point, viz.:

'The laws of Iowa under consideration in *Bowman v. Railway Co.*, 125 U. S. 465 (8 Sup. Ct. 689, 1062, 31 L. Ed. 700), and *Leisy v. Hardin*, 135 U. S. 100 (10 Sup. Ct. 681, 34 L. Ed. 128), were enacted in the exercise of the police power of the state, and not at all as regulations of commerce with foreign nations and among the states, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one state and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence it was held that, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by a uniform system so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the

state, or their sale upon arrival, in the form in which they were imported there from a foreign country or another state. It followed as a corollary that, when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

'Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection? . . . It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the state. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.

'Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the states did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

'By the adoption of the Constitution the ability of the several states to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any state of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that

the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.

‘The principle upon which local option laws, so called, have been sustained, is that, while the Legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the act of Congress on this analogy. The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or state. *Brown v. Maryland*, 12 Wheat. 448 (6 L. Ed. 678).

‘No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

‘The differences of opinion which have existed in this tribunal in many leading cases upon this subject have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the states.

‘We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.

‘The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge. The manner of that disposition brought into de-

termination upon this record involves no ground for adjudging the act of Congress inoperative and void.'

That it was not necessary for the Legislature to re-enact our laws, see *Brewing Co. v. Stevens*, 102 Iowa, 60; *Tuttle v. Polk*, 84 Iowa, 12.

9. SAME: congressional legislation: re-enactment of state law.

There is no occasion in this case to determine what is necessary to be shown to make the act of the carrier or of the consignee criminal. No such charge is made; and, if it were, enough appears in the findings of fact made by the trial court to justify a holding that the carrier was aiding or abetting the purchaser in a violation of the law.

Many other matters are discussed, but what has been said disposes of the case.

The trial court was in error in dismissing the petition, and its judgment and decree must be reversed, and the case remanded for a decree in harmony with this opinion.

Reversed and Remanded. All the Justices concur.

GERTRUDE HAIGH, Appellee, v. WHITE WAY LAUNDRY COMPANY, a Corporation, Appellant.

Fraud: SETTLEMENT FOR PERSONAL INJURY. The mere expression of
1 an erroneous opinion concerning the recovery of one injured, if honestly made, will not authorize the setting aside of a settlement for the injury; but if coupled with statements of fact concerning the nature and character of the injury which were not true, but having a direct bearing upon the extent of liability and likely to induce a belief in speedy recovery, will constitute ground for setting aside the settlement and release.

Same. The positive assertion of a fact as true when made for the purpose of gaining an advantage, which is in good faith relied on and
2 acted upon as true, is as binding upon the party making the statement as though he knew it to be untrue, and he will not be heard to say that he did not know that it was false at the time he made it.

Appeal from Scott District Court.—HON. WILLIAM THEOPHILUS, Judge.

WEDNESDAY, FEBRUARY 18, 1914.

ACTION to recover damages for personal injury. Defendant pleads settlement. Plaintiff replies alleging fraud in procuring settlement. Demurrer to reply. Demurrer overruled. Defendant appeals.—*Affirmed.*

Ralph C. Williamson, for appellant.

Ely & Bush, for appellee.

GAYNOR, J.—This is an action to recover damages for a personal injury. The plaintiff claims in her petition that on the 16th day of October, 1911, she was in the employ of the defendant in and about its laundry, and while in the exercise of due care on her part, her hand was caught and burned in an unguarded mangle; that her injuries were caused by, and due to, the negligence of the defendant, in this, that it negligently, and in violation of the statute, maintained a mangle without any guard of any kind thereon, and negligently failed to warn the plaintiff of the danger thereof, and negligently required the plaintiff to work at said mangle while the same was unguarded; that, by reason of the injuries received, she was crippled and disfigured. The defendant, answering, said, among other things, that on the 31st of October, 1911, the plaintiff and defendant entered into a written contract whereby they adjusted and settled any cause of action which the plaintiff had by reason of the matters complained of in her petition; said contract being in words and figures as follows:

Whereas, the undersigned was injured on or about the 18th day of October, 1911, under circumstances claimed to

render White Way Laundry Company liable in damage; and whereas said White Way Laundry Company denies liability therefor; and whereas both parties desire to compromise and have agreed to adjust and settle the matter for the sum of thirty dollars: Now therefore, in consideration of said sum, the receipt of which is hereby acknowledged, I, Gertie Haigh, do for myself, my heirs, executors and administrators, hereby compromise said claim and release and forever discharge said White Way Laundry Company from any and all liability which has accrued or may hereafter accrue to myself, my heirs, executors and administrators, by reason of said injuries or damages accruing therefrom. Witness my hand and seal at Davenport, Iowa, this 31st day of October, 1911. Gertie Haigh.

The plaintiff, replying to this defense, states that the contract of release relied upon by the defendant was obtained by misrepresentation and by mistake as to the material facts of her injury, as follows:

That defendant, by its local representative, John Hynes, stated and represented to plaintiff, at and before the making of said written release, that plaintiff's injuries were trifling; that the tendons of her hand were not injured; that said injuries would not continue for more than two or three weeks longer; and that plaintiff would entirely recover therefrom, and her hand would be as well as ever. That plaintiff relied upon the truth of said representations and representations to the same effect made by one F. H. Brand, who treated plaintiff as a physician in the employment of defendant, and believed said representations to be true and consented to execute a written release upon the faith of said representations, but that in truth and in fact said representations were not true, and that the tendons of plaintiff's hand were injured; that her hand was permanently disabled; that she did not recover in two or three weeks thereafter, and has never completely recovered the use of her hand, but was compelled to submit to an exceedingly painful surgical operation, including the grafting of a large patch of skin from her body upon the palm of her hand and the loosening of the tendons thereof, and the repair of the sheath of the tendons, and was obliged

to submit to a third surgical operation to relieve certain contractions and attachments of the skin and flesh of the fingers and hand. That by reason of the misrepresentations and the mistake of the parties as to material matters of fact when executed, plaintiff is not bound thereby. Wherefore, plaintiff demands judgment as prayed in her original petition.

The defendant demurred to this reply on the ground that the allegations contained therein do not set out such representations or mistakes as to material facts, which, if proven, avoid the release pleaded by the defendant. This demurrer was overruled, and, from the ruling on the demurrer, the defendant appeals.

This case presents but one question, whether or not the allegations of the reply are sufficient, in and of themselves, to avoid the effect of the release executed by the plaintiff. There has been much discussion of this question in the books, and the line of demarcation is not clearly drawn, and it is sometimes difficult to distinguish the rule which affirms the settlement, and the rule that avoids the settlement, as the same has been applied to the facts in particular cases. Language is intended to convey ideas, to be a vehicle of thought. Its use, however, and the manner of its use, does not always clearly accomplish the purpose for which it was intended. There are, however, some general rules recognized and enforced in matters of this kind, and so well settled that no difficulty arises, in their application to a given state of facts, when the fact conditions are made plain, by the words used in setting them forth. In the pleading before us, there are many statements made, as a basis for avoiding the settlement, which, in and of themselves, do not have the effect contended for them. They are merely expressions of opinion, as to results to be anticipated in the future, from known and recognized conditions. There is no direct allegation that these opinions were not honestly given. There is no direct allegation

that they were given with the intent of leading the plaintiff into the execution of the release.

That the plaintiff's hand was injured, and that this was manifest and known to her, must be conceded. This independent fact was as well known to her as to the company. The

length of time that would be required to heal
1. FRAUD: settle-
ment for per-
sonal injury. was largely a matter of speculation, of opinion, based upon conditions then existing.

An honest opinion given upon this matter could not constitute a fraud. The mere opinion, therefore, as to the time when she would recover from the injuries, standing alone, does not have the effect of avoiding the release relied upon. But in this case more than an opinion was given to induce settlement. Substantive facts were stated as a basis of the opinion, to wit, that the injuries were trifling; that the tendons of the hand were not injured. These are the assertions of distinct facts which had relation to, and direct bearing upon, the extent of the defendant's liability to the plaintiff; statements which, if true, tended to create in the mind of the plaintiff the impression "that she would entirely recover therefrom and her hand would be as well as ever."

A "misrepresentation" is that which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially, it is understood to mean a statement made to deceive or mislead. Any statement made of a substantive fact, material to the proper understanding and a fair adjustment of the matter in hand, made with intent to deceive or mislead, and thereby secure an undue advantage, involves the element of fraud, and fraud vitiates all contracts.

It must be borne in mind that the reply shows that these statements were made before, and at the very time, the release was secured. The party making the statements represented the company, was there in the interests of the company. A jury might well find that it was his purpose to

secure, for the company, as favorable a settlement as possible. The representations, so far as this record shows (and a jury might well find it to be a fact), were made for the purpose of securing such a settlement for the company that they were made with the intent to mislead the plaintiff to the end that such a settlement might be effected. The plaintiff says defendant misrepresented the facts; that she relied upon his representations as true, and a jury might well find, from these ultimate facts, the further fact that she would not have signed the release had she known them to be untrue. Some courts have gone even so far as to hold that, a statement made to induce a settlement, to the effect that the injuries were trivial and temporary, when relied upon, may constitute such fraudulent conduct as will avoid the settlement.

The positive assertion of a material fact as true, made for the purpose of securing an undue advantage (when it is shown that the party to whom the statement was made, in good faith, relied and acted upon it as true), is
2. SAME. as binding upon the party making it as though he knew it to be untrue. Or, in other words, a party cannot falsely assert a fact to be true and induce another to rely upon such statement to his prejudice, and thereafter hide behind a claim that he did not know it was false at the time he asserted it. To avoid a settlement of this kind, there must be proof of fraud. Where a false representation is relied upon as constituting fraud, it must be shown to have been knowingly made with intent to mislead, or that the party made the statement as true with no reasonable ground to believe it to be true, for the purpose of inducing the other to act. This question is discussed, and very nicely disposed of, in *Derry v. Peek*, 14 App. Cas. 337. This is an English case. So in this case, it is immaterial whether or not the company, by its agent, knew or did not know, whether the tendons of the plaintiff's hand were in fact injured, for the reason that the defendant, through its agent, asserted it as a

fact (and it was a material fact), for the purpose (and there could be no other purpose) of inducing the plaintiff to believe it was true, and that her injuries were trifling; that she would soon recover; that her damages were slight. The immateriality of the knowledge of the defendant of the truth or falsity of its statement becomes more apparent when it is shown that it was deliberately and intentionally made to secure an undue advantage, and that plaintiff believed the statement to be true, and, in such belief, was led into the execution of the release relied upon. The fraud consists in asserting that to be true which was not true; which the defendant did not know to be true; made with a wrongful purpose, and resulting in injury to the plaintiff. See, also, *Davis v. Central Land Co.*, 162 Iowa, 269.

The case of *Nason v. Railway Co.*, 140 Iowa, 534, relied upon by the defendant, does not aid us in the solution of the question here. In that case it was held that the only matter relied upon to avoid the release was that the assurance given by the doctor of an early recovery was subsequently proven to be incorrect, that there was no substantive fact stated by the doctor, as to the then condition of the injured, which was untrue, and the plaintiff himself said that in making the settlement he relied only upon the representation or predictions made by the doctor concerning an early recovery, and his right to avoid the release was based solely on the ground that the doctor was mistaken in his prognosis. The court in that case, in substance, held that, in the absence of some fact or circumstance justifying the conclusion that the statements were fraudulently made to deceive, or mislead, the injured party as to his then real condition, and thus aid the appellant in obtaining an advantageous settlement with him, the mere statement of an opinion, as to the probable future consequences to flow from the injury, was not sufficient to avoid the effect of the settlement. It is said, however, in that case that: "We must not be understood as hold-

ing that expressions of professional opinion, by a surgeon in the employment of the party charged with the responsibility for a personal injury, when made to the injured person for the purpose of inducing a settlement of his claim for damages, may not constitute fraud and false representations; but we do hold that, to justify the conclusion of fraud, something more must be shown than that the opinion or representation has been proven incorrect.”

The same thought runs through *Kilmartin v. C. B. & Q. Ry. Co.*, 137 Iowa, 64.

In *Houston & T. C. R. Co. v. Brown* (Tex.), 69 S. W. 651, a release of damages for broken arm was made by a railroad employee, in reliance upon the statement of the physician acting for the railroad company, made for the purpose of inducing the execution of the same, that the bones of the arm had knit together, and that the arm would be as good as ever. It was held that the release was not binding upon the employee even though the statement of the physician was made in good faith. The court said: “We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made . . . were a mere expression of opinion. It was more than an opinion—it was the statement of a fact. . . . It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made . . . was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement, and executed the release, believing the statement to be true. In such case, innocent misrepresentation may as well be the basis of relief as where such statements were intentionally false.”

In disposing of this case, we must take the allegation of the reply as true, and therein we find statements, made by

the defendant, of fact material to be considered in the proper adjustment of defendant's liability to the plaintiff. These statements are alleged to be untrue, and that the plaintiff relied upon the statements as being true, and therein lies the gravamen of the complaint in the reply, and we think, therefore, the demurrer was properly overruled, and the cause is affirmed.—*Affirmed.*

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

REEVES & COMPANY, Appellant, v. R. R. YOUNGLOVE and
B. K. YOUNGLOVE, Appellees.

Sales: BREACH OF WARRANTY: EVIDENCE. Plaintiff sold defendants
1 a gang plow under a warranty that with proper management it would do as good work as any other plow of like size and capacity made for the same purpose. On an issue of breach of the warranty defendants showed the inferior kind and quality of the work done, and the amount of ground a plow of the size of the one in controversy would plow in a day or an hour when in good working order. *Held*, that there was no apparent prejudice in permitting defendants to show that while plaintiffs' agent was present trying to fulfill the warranty defendant plowed an equal amount of ground with a plow of less capacity.

Same. It was also competent for defendants to show in support of
2 their claim that the plow would not do good work with the best practical handling; that land owners employed by them refused to allow them to complete their work because of its inferior character; as bearing upon the reasonableness of their contention, and the right to rescind.

Examination of witnesses: DISCRETION. Whether a party may abandon
3 the cross-examination of a witness of the opposing party and proceed to examine him as his own witness is a matter wholly discretionary with the court.

Appeal: LAW OF THE CASE. The ruling upon a former appeal that the
4 evidence of waiver of a provision of the contract of sale was sufficient to take that question to the jury, constitutes the law of the case on a retrial on substantially the same evidence.

Sales: BREACH OF WARRANTY: DUTY TO RETURN: WAIVER. Where defendants, in an attempt to make the plow in question comply with the warranty, changed the mold boards to reduce the friction, and upon their failure to make it work plaintiff's agent also made an unsuccessful attempt to make it work while in its changed condition, the removal of the mold boards, which could easily be replaced and to which no objection was made, was not such an alteration of the plow as to relieve the agent's statement that he did not care what was done with the plow and that it belonged to defendants and they would have to pay for it, of its effect as a waiver of the contract provision to return it to the railway station in case it could not be made to work properly.

Appeal from Woodbury District Court.—HON. J. F. OLIVER,
Judge.

WEDNESDAY, FEBRUARY 18, 1914.

ACTION at law upon promissory notes given for the purchase price of a steam gang plow. Defendants pleaded breach of the warranty made by the plaintiff and a rescission of the contract of purchase. They also set up a counterclaim for damages. There was a verdict for defendants and for a recovery on their counterclaim. Plaintiff appeals.—*Affirmed.*

Shull, Sammis & Stilwell, W. R. Baxter, and John A. Garver, for appellant.

W. G. Sears, and B. A. Goodspeed, for appellees.

WEAVER, J.—It is conceded that defendants gave the notes in suit for the purchase price of a steam plow, that the plow was sold to the defendants for use by them in Saskatchewan, Canada, and that such sale was accompanied by a written contract of warranty. It is the claim of the defendants that upon delivery and trial of the plow it failed to do good work, that on notice of that fact plaintiff sent to them its agents, who endeavored to adjust it and make it per-

form as warranted, but failed so to do, and that thereupon they tendered a return of the plow, which was refused. They further aver that they have ever since held such plow subject to plaintiff's order and have been and are still ready to return it. They further allege that they paid the freight and customhouse charges on the plow and ask to recover from plaintiff the expenses so incurred. The issues have been twice tried. Upon the first trial the court directed a verdict for the plaintiff, but on appeal to this court the judgment so rendered was reversed. *Reeves v. Younglove*, 148 Iowa, 699. We there held that, notwithstanding the requirements of the contract as to the time and manner of giving notice of the failure of the plow to work, strictness of compliance therewith would be considered waived if, to such notice as was in fact given, plaintiff responded and undertook to remedy the alleged defects in the implement; and that the announcement by plaintiff's agent that a return of the plow would not be accepted was a sufficient waiver of the necessity of a formal tender of such return. It was further held that, if defendants succeeded in establishing the alleged breach of warranty and their rescission of the contract, they would be entitled to recover upon their counterclaim for freight and charges paid. The cause has since been retried and the issues found in favor of the defendants. For a reversal of the judgment below appellants rely on two propositions—that there was error in certain rulings of the court upon matters of evidence, and that the evidence is insufficient to sustain a finding of a waiver of the return of the plow.

I. The point of the exceptions taken by appellant will be more readily understood by reference to the written warranty, which is in the following form:

The machinery furnished on this order is warranted to be made of good material, well constructed, and with proper use and management to do as good work as any other of the

same size and rated capacity, made for the same purpose. If inside of six (6) days from the day of its first use it shall fail in any respect to fill this warranty, written notice shall be given immediately by the purchaser to the vendor at its home office, Columbus, Ind., and written notice also to the local agent through whom the same was received, stating particularly what parts and wherein it fails to fill the warranty, and a reasonable time allowed the vendor to get to the machine with skilled workmen and remedy the defects, if any there be (if it be of such a nature that a remedy cannot be suggested by letter), the purchaser to render all necessary and friendly assistance and co-operate in making the machinery a practical success. If any part of the machinery cannot be made to fill the warranty, that part which fails shall be returned immediately by the purchaser to the place where it was received, with the option in the vendor either to furnish another machine, or part, in place of the machine or part so returned, or return the money and notes which shall have been given for the same, and thereby rescind the contract *pro tanto*, or in whole, as the case may be, and be released from any further liability whatever herein.

In view of the holding by this court on the former appeal, it cannot well be denied that as to the alleged breach of this warranty and the sufficiency of the notice thereof to the plaintiff the defendants made a case which entitled them to go to the jury. Indeed, we do not understand counsel as contesting that proposition, but it is said that certain testimony relating to the work of the plow was erroneously admitted to the appellant's prejudice. After showing the inferior kind and quality of work done by this plow, testimony was admitted without objection that with a gang plow of the size of the one in controversy and working in good order twenty to thirty acres was a good average day's work, or from two to two and a half acres per hour. It was also shown without objection that about the time of the agent's visit defendants used another plow pulled by the same engine and using eight to ten bottoms, a capacity which was less than that of the plow in con-

1. SALES: breach
of warranty:
evidence.

troversy. This was followed by the question, "How many acres did you plow with that?" To this plaintiff objected as being incompetent and irrelevant, but the witness was allowed to answer that it plowed from two to two and one-fourth acres per hour. On this ruling error is assigned. We find nothing in it of which plaintiff can complain. One of the terms of the warranty was that the plow would do as good work as any other of the same size and rated capacity. Having adopted this as one of its standards of excellence, there is no apparent prejudice in comparing its work with another of less capacity; but, whether strictly admissible or not, the testimony is not of an importance or character which would justify us in ordering another trial because of such ruling.

One of the defendants was also allowed to testify that at the time of testing the implement they were doing a job for one Farrer, who objected to the quality of the work so performed, and refused to permit them to pro-

2. SAME.

ceed. If, as defendants claimed, the plow, with the best practical handling, would not do good work, and its defects were of such character that landowners employing them refused to allow them to complete their jobs, we think the fact is not without bearing upon the reasonableness of their complaints to the plaintiff and their right to rescind the purchase. Moreover, it is so intimately connected with their claim to have made a fair trial of the plow and of the work which it could be made to perform, it may well be treated as *res gestæ* and proper matter for consideration by the jury.

On cross-examination of this witness counsel for appellant sought to draw out something in regard to another implement, spoken of as the Cockshutt plow, which defendants purchased about that time. Objection being

3. EXAMINATION
OF WITNESSES:
discretion.

raised, counsel responded, "For the purpose of this question we will make him our own witness," and then proceeded to ask him whether he had

not at that time contracted for another plow of the same general kind and character as the Reeves plow. This was ruled out on defendant's objection, and here, also, error is assigned. Whether a party shall be permitted to abandon the cross-examination of a witness for the opposing party and proceed to examine him as his own witness is a matter wholly within the discretion of the trial court.

Being denied the right so to do, it was still open to appellant to call the witness in rebuttal or prove the fact, so far as it was material, by any other witnesses after the defendants had rested.

Without further discussion of the ruling upon evidence, we may say they are of the same general character as those which we have specially mentioned, and after full examination none of them appear to involve any reversible error.

II. Is the evidence sufficient to justify a finding that plaintiff waived a return of the plow?

We are of the opinion that the ruling by this court upon the former appeal requires us to answer that question in the affirmative. In disposing of that appeal we called attention to the testimony of the defendants to the effect that, when plaintiff's agent had failed to make the plow work properly and was about to leave the premises, defendants said to him they were not satisfied with it, and asked him what they should do with it, to which question the agent replied he did not care what they did with the plow, and that it belonged to the defendants, and that they would have to pay for it. This showing we expressly held was sufficient to carry to the jury the question whether plaintiff had not waived that part of the contract which required defendants to return the plow to the railway station where it was received.

The testimony on the second trial with respect to the conversation mentioned and the statement of the agent that

4. **APPEAL:** law of
the case.

he did not care what was done with the plow, that it was defendant's property, and that they would have to pay for it, is substantially a repetition of that given on the first trial, and the holding with reference thereto must be considered the law of the case as it relates to this proposition. Counsel conceive, however, that the effect of this rule is avoided because it now appears that, when the agent visited defendants the last time, they had taken the mold boards from a part of the plows in the gang and substituted others. The mold boards furnished with the plow were of solid steel, while the others were made of rods and were being used in the hope that the friction in pulling the instrument through the ground might thereby be lessened. It is said in argument that defendants had dismantled or changed the plow and that the implement they proposed to return was not the one delivered to them. But it appears that the mold boards were attached to the plow by removable bolts, and, having been removed, could be readily replaced. They were in the immediate vicinity when the offer to return was made, and their replacement could have been accomplished with slight effort. The agent had been testing the plow with the substituted parts without objection. When asked about the return, he made no objection on account of the condition of the plow, but depended upon his own conclusion or belief that it complied with the warranty and that defendants were therefore bound to keep and pay for it. If in reply he had said no more than that plaintiff would expect them to comply with their contract, or had objected that the plow was not in the condition in which it was sold, there might be room for argument in support of the contention now made. Had he not refused to consider the question of a return and had told the defendants to haul the plow to the station, it is fair to presume that they would have put it in the shape in which they received it. The plea made in avoidance of the waiver is quite evidently an afterthought, and we think it lacks merit. At the very most which

5. SALES : breach
of warranty :
duty to return :
waiver.

can be claimed for it, it is not sufficient to enable the trial court or this court to dispose of the alleged waiver as a matter of law.

There is no reversible error in the record, and the judgment appealed from is *Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concur.

HUGO C. VOGT, Administrator of the Estate of John McPeck, Deceased, Appellee, v. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Appeal: REVIEWABLE ASSIGNMENTS OF ERROR. The appellate court will
1 not pass upon assignments of error in a law action, upon which the trial court has not had an opportunity to rule.

Same: DIRECTION OF VERDICT: WAIVER OF MOTION: SUFFICIENCY OF
2 EVIDENCE: REVIEW. By the introduction of evidence after a motion for a directed verdict at the close of plaintiff's case for insufficiency of the evidence, the defendant waives any error in the ruling upon the motion: and unless the question is again properly raised during the trial the sufficiency of the evidence to support the verdict will not be reviewed on appeal.

Appeal from Scott District Court.—HON. A. P. BARKER, Judge.

WEDNESDAY, FEBRUARY 18, 1914.

ACTION for damages for personal injury resulting from negligence. From a verdict and judgment for plaintiff, the defendant appeals.—*Dismissed*.

Cook & Balluff, F. W. Sargent, and Robt. J. Bannister, for appellant.

Henry H. Jedens, Frank Cooper, and Bollinger & Block, for appellee.

WITHROW, J.—Defendant brings this appeal from a judgment against it on a verdict in an action for personal injuries, based upon negligence.

The assignments of error are seven in number, the first four relating to instructions submitting to the jury the question of negligence, the next two upon the question of contributory negligence, and the last one in submitting the question of defendant's negligence and the plaintiff's freedom from contributory negligence.

It is the claim of the appellant that the evidence was insufficient to support a finding of negligence and freedom from contributory negligence. These questions and no others are covered by the assignments of error.

On the part of the appellee it is claimed that the record is such that the appellant has not the right to a review of these question on this appeal.

Upon the conclusion of plaintiff's evidence in chief, the defendant moved for a directed verdict, urging that there was no showing of negligence on its part, and also that it affirmatively appeared that the plaintiff at the time of the accident was not exercising due care. The motion was overruled, and defendant excepted. Following this, evidence on the part of the defendant was presented, upon the conclusion of which the court instructed the jury, the defendant excepting to all instructions, and verdict was later returned. No motion or exception challenging the sufficiency of the evidence to warrant a verdict against the defendant was presented at the close of all the evidence, nor was there any motion for a new trial.

I. It is the claim of the appellee that this court can only review on appeal those questions which were presented to the trial court, and which were ruled upon by it and excepted to.

The right of this court in considering appeals in actions at law is to pass upon the questions of error only; and it has been held under the statute in many cases, and never to the contrary, that it will

1. APPEAL: reviewable assignments of error.

not consider as allegations of error matters upon which the trial court had not first had the opportunity to rule. Code, section 4105; *Smith v. Warren Co.*, 49 Iowa, 336; *Ash v. Scott*, 76 Iowa, 27; *Reynolds v. Insurance Co.*, 80 Iowa, 563.

In *Shulte v. Railway*, 124 Iowa, 191, this court held that a question as to the sufficiency of the evidence to support a verdict must be presented to the trial court on a motion for new trial, and cannot be first raised in the Appellate Court. In noticing this case counsel for appellant urges that under the rules of practice which governed at the time of the trial of this cause in the lower court, by preserving exceptions to the instructions when given, the record was sufficiently made to give to it the right to have considered on appeal errors in the instructions thus excepted to, and this without presenting a motion for a new trial, citing *Scott v. C., R. I. & P. Ry.*, 160 Iowa, 306. The rule as there generally stated is correct; but included in it is the necessary provision that the trial court must first have passed upon the question presented. In the cited case is used this language: "That any matter passed upon by the trial court during the trial, properly excepted to, may be reviewed by this court, without motion for a new trial." The question arising in that case, and in the cases cited by appellant in support of the rule as claimed by it, related not to a state of the record involving the question of its sufficiency to sustain a verdict, but to matters arising upon the trial where rulings had been made and exceptions preserved.

In the present case the criticized instructions relate only to the propositions of negligence and contributory negligence. It was the duty of the trial court in submitting the case to present such questions fully to the jury, and it did so. There had been no challenge of its right or duty to submit the questions of fact for a finding, save in the motion to direct a verdict made by the appellant at the close of the plaintiff's evidence. By proceeding to introduce evidence in defense

2. SAME: direction of verdict: waiver of motion: sufficiency of evidence: review.

after an adverse ruling on the motion to direct a verdict, the error, if any, was waived. The question was not again raised during the trial; and it cannot be held that the trial court committed error in not directing a verdict for the defendant on its own motion without being requested to so do.

Clearly then it must be held that the question of the sufficiency of the evidence to sustain the verdict cannot be considered upon this appeal, unless it shall be that the manner in which it is raised—by a challenge of the instructions—place it outside of the rule. But we are of opinion that it does not do so. Did the criticized instructions relate to matters not covering the whole fact record, but to questions properly raised and ruled upon during the trial, a different question would arise; but, when they relate only to the sufficiency of the facts to warrant a verdict, and no other basis can be found upon which to criticize the instructions which were given, we are clear that, before this court can consider such alleged errors on appeal, it must appear that the trial court, by motion or otherwise, was called upon to consider that question. This the record fails to show.

The appeal is *dismissed*.

LADD, C. J., and DEEMER, EVANS, PRESTON, WEAVER, and GAYNOR, JJ., concur.

G. W. VAN LANINGHAM, Appellee, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Assignment of wages: PRIORITY. A railway company may require of an employee, as a condition precedent to his employment, that he shall provide himself with a watch of the standard fixed by its chief inspector; and it may provide for an assignment of his wages to be earned in the future with which to pay for the same, if necessary, and such assignment will be valid although not signed by his wife: so that an accepted assignment of that character, though not signed by the wife, will take precedence over subsequent assignments, acknowledged by both the employee and his wife.

Appeal from Dallas District Court.—HON. W. H. FAHEY,
Judge.

WEDNESDAY, FEBRUARY 18, 1914.

APPEAL by defendant from a judgment holding it liable as garnishee upon an assignment of wages of an employee. —*Reversed.*

H. G. Giddings, and Cook, Hughes & Sutherland, for appellant.

William H. Winegar, for appellee.

WITHROW, J.—On June 15, 1912, one A. A. Smith, a married man, entered the employ of the Chicago, Milwaukee & St. Paul Railway Company as brakeman, the contract of employment being in writing. At the time of his employment he was informed by the employing officer of the railway company of a rule requiring that employees should have and carry a watch of the standard fixed by the chief inspector. It is also shown to be a rule and practice of the company that when an employee has not a standard watch, and is compelled to buy one, and is without means with which to make the purchase, that the company protects the seller, and from the wages earned by the employee, upon notice of such sale and assignment of wages to meet the purchase, pays the obligation thus incurred; and this practice is based upon an agreement between the railway company and the seller that such will be done. July 30th, following his employment, in the purchase of a standard watch by the employee Smith, he executed and delivered to A. M. Church, from whom it was bought, an assignment of his wages in the total amount of \$47, payable in installments, the first, for \$11, being payable August 25th, and three other installments of \$12 each being payable monthly, on the 25th day of the following months.

This order was filed in the office of the superintendent of the railway company at Marion, Iowa, August 1, 1912. On the 5th day of August Smith executed an order for board in the sum of \$5.50, and on August 16th another one for like amount and for the same purposes. The board orders and watch order were presented to and accepted by the railway company before the presentation to it of the assignments upon which the garnishment proceedings in this case were based. On July 15th, Smith, with his wife, assigned to Van Laningham, appellee herein, "all our wages earned and to be earned, due and to become due to us or either of us from the C., M. & St. P. Ry., for the term of three years." The assignment recited that it was for a valuable consideration, and as security for any additional loans made by him to the assignors or either of them, during three years. The assignors represented that there were no watch orders or other claims or liens against said wages. This assignment was duly acknowledged, and a copy of it was filed with one of the clerks of the agent at the Milwaukee depot on August 19th. At the time of the assignment Smith was indebted to Van Laningham on two notes amounting to \$14.30. It appears in the record that at the time of the trial Smith was no longer in the employ of the railway company, and that the watch had not been returned. Smith having failed to pay the indebtedness, and the railway company having refused to honor the assignment to Van Laningham, the latter commenced suit in justice court by way of garnishment. Upon the trial it appeared without contradiction that the only indebtedness from the railway company to Smith was the sum of \$56.66 earned by the latter during the month of August, 1912. The issues presented in justice court were as we have stated them here. Upon hearing, judgment was rendered against the railway company for the amount of Van Laningham's claim, with costs. The cause was taken by writ of error to the district court, where upon trial the writ was dismissed, the court holding that the judgment entered by the justice of the peace was right, although

in reaching it no allowance had been made for the board orders, which the district court held should have been deducted under the rule of *Steltzer v. C., M. & St. P. Ry.*, 156 Iowa, 1. But after deducting such amounts, there yet remaining in the hands of the defendant railway company an amount sufficient to meet the assignment, the district court held that the judgment was warranted, and dismissed the writ of error, holding the board orders, but not the watch order, to be proper offsets. From this ruling and judgment the railway company appeals.

II. Of the questions raised by this appeal we consider first that which relates to the effect of the watch order as an assignment. It is the claim of the appellee that it was an assignment of his wages by Smith, and that such was of no validity because not signed and acknowledged by his wife as required by section 3047, Code Supplement. Upon the trial it was conceded that at the time of the employment of Smith he was instructed to procure a standard watch, such as was required by the rules of the company, and that he might execute a watch order to a watch inspector of the company in payment for such.

In *Steltzer v. C., M. & St. P. Ry.*, *supra*, a case where the effect of board orders was considered, although it does not appear that the employee was married, this court passed as not necessary to be then determined the question whether such orders or contract should be designated as assignments, or as contracts under which the defendant had the right to pay the debts of the employee. We go directly to the question stated. It is not an unreasonable rule that a railway company may require of its employees those things which tend to the safety of its property and of its passengers. It may require as a condition of the employment that its servant shall provide himself with that which is an aid in securing such safety; and it may obligate itself and be bound by such obligation to pay for that which is furnished to the employee for such purpose, securing itself in proper way for the indebtedness thus

incurred, when the legal title to that which is thus secured by the employee is in him.

The object of the statute relied upon by the appellee is to protect the wife of the employee against dissipation of his wages for purposes other than first for family support. But the right of the employee Smith, to earn wages as a servant of the railway company, in the first instance depended upon his agreement to comply with its rules, among which was that as to furnishing himself with a watch. The promise and obligation to procure the watch was a part of the consideration of his employment, and, having assigned his wages to meet the indebtedness incurred in furnishing that consideration, other unaccepted claims against the pledged fund, even though based upon an assignment under the statute, had not the right to priority against it. The compliance with such rule may well be considered and treated as that which entered into the equipment of the company in the discharge of its service to the public, and we are of opinion that an order against wages to meet that particular purchase or indebtedness, accepted in payment of it by the employer so inhered in the contract of employment as to be a part of it; and to the extent that his earnings may be needed to meet it the exemption right cannot be claimed by the wife or by those claiming under assignment by her and her husband. The question is not unlike in principle to that arising under a claim for a purchase-money lien.

III. The record shows without dispute that as between the claims of the appellee based upon the assignment of husband and wife, and the accepted watch order, the latter was prior in point of time; and as we hold the signature and acknowledgment of the wife was not necessary to give validity to the watch order, it must be held to have precedence over the assignment of the appellee. The right of Smith to his wages had been reduced to that extent, and his assignee, the appellee took no greater rights than he had. *Metcalf v. Kincaid*, 87 Iowa, 443; *Brewing Co. v. Hansen*, 104 Iowa, 307.

IV. No appeal was taken by the plaintiff from that part of the ruling and judgment which admitted the board orders as proper set-offs, and such will be accepted as the law of the case.

V. It is unnecessary to determine the question as to whether filing appellee's claim with a clerk in the depot was a sufficient notice of it, for the reason that the conclusion reached in the second division of this opinion is decisive of the case on its merits. The judgment of the trial court is *Reversed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

WILLIAM G. KITZMAN, Plaintiff and Appellant, v. ROBERT GREENHALGH, FLORA M. GREENHALGH, LEWIS SNARE, MARY SNARE, Defendants and Appellees.

Highways: FILING OF VILLAGE PLAT: EFFECT. The filing of a plat and dedication of a highway in an unincorporated village creates simply an easement, or right to use the highway for public purposes. The title to the highway remains in the original owner charged with the easement, and when vacated the unincumbered possession of the same reverts to him. Thus where two tracts of land were platted, taking four feet from one and fifty-six feet from the other, which was dedicated as a highway, and thereafter the owner conveyed the tract from which the fifty-six feet were taken, and his grantee conveyed by quitclaim all his interest in the lots and streets in the plat, upon vacation of the street the entire beneficial ownership of that part of the street taken from the tract conveyed vested in the owner at the time of its vacation.

Appeal from Keokuk District Court.—HON. K. E. WILLCOCKSON, Judge.

WEDNESDAY, FEBRUARY 18, 1914.

ACTION to quiet title to a certain piece of land in the village of Janetown, which had formerly been used for road

purposes, but which, before the commencement of the action, had been vacated.—*Reversed*,

Stockman & Baker, for appellant.

D. W. Hamilton, for appellees.

GAYNOR J.—The plat of the original village of Janetown was in the S. E. $\frac{1}{4}$ of section 33, township 77, range 13. On the 4th day of October, 1882, one Abraham Carl was the owner of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34 in the same township, and on that date duly platted a strip along the west side of the same, and filed said plat in the office of the recorder of Keokuk county, from which plat it appears that the platted ground was divided into four blocks, and those blocks subdivided into lots, with streets running east and west through the platted land, and one street, sixty feet wide, running north and south along the east of the platted ground, known as Fred street. The platted ground included approximately the west ten acres of said forty, and the street known as Fred street included fifty-six feet of the east thirty acres of said tract. The street was sixty feet wide. Therefore four feet of Fred street was taken from the ten acres platted, and fifty-six feet from the thirty acres. Said plat was known as Carl's addition to Janetown. On August 31, 1901, Carl, the original owner of said forty, conveyed the east thirty acres thereof to appellant, Kitzman, by warranty deed, which deed was duly recorded in November, 1901. In September, 1902, Carl quitclaimed to appellee Robert Greenhalgh all his interest in the lots in Carl's addition to Janetown, and also his right, title, and interest in the streets and alleys in said addition to Janetown. Subsequently, and on the 26th day of April, 1904, the defendant Greenhalgh prepared and signed the following instrument, which was duly acknowledged and duly filed for record in the recorder's office of said county, on the 3d day of June, 1904: "Know all men by these pres-

ents, that we the undersigned the owners and proprietors of all of blocks one (1) two (2) and three (3) in Carl's addition to the village of Janetown, Keokuk county, Iowa; the plat of which Carl's addition to Janetown, is on file in the office of the recorder of said county, and recorded in Plat Book 1, page 281, and we do hereby declare all of the streets and alleys going through said blocks except Main street, vacated." Subsequently, and on August 21, 1909, he filed in the office of recorder, the following instrument: "Know all men by these presents that we the undersigned owner and proprietor of all of block four in Carl's addition to the village of Janetown, Keokuk county, Iowa, the plat of which is on file in the office of the recorder of said county, and recorded in Plat Book 1 on page 281, and I do hereby declare all of the streets and alleys surrounding said block and those streets and alleys going through said block, except Main street, vacated." On the 21st day of July, 1909, plaintiff, with others, filed the following petition with the auditor of said county, which petition was duly granted on November 9, 1909: "To the Honorable Board of Supervisors of Keokuk County, State of Iowa: The undersigned ask that a street commencing at the southwest corner of the east thirty (30) acres of the southwest quarter of the southwest quarter of section thirty-four (34), township seventy-seven (77), range thirteen (13) west in Keokuk county, Iowa, and running thence north eighty (80) rods, and comprising the west four rods of the said thirty-acre tract above described, and which said street or highway has been heretofore known as Fred street in Carl's addition to the village of Janetown, be vacated." The controversy in this case involves the right to Fred street. Plaintiff claims title to the entire street under his deed of the east thirty acres, dated August 31, 1901. Defendant claims title to this Fred street under his quitclaim deed dated September, 1902, hereinbefore referred to. The court below entered a degree in favor of the plaintiff, for the east thirty feet of

Fred street, and in favor of the defendant for the west thirty feet. From this decree, the plaintiff appeals.

It is conceded that the village of Janetown is not now, and never has been, incorporated.

Section 638 of the Code provides that municipal corporations, referred to in this title, shall be divided into cities of the first class, cities of the second class, and towns. Town sites, platted and unincorporated, shall be known as villages.

Section 1507 provides: "All public streets of villages are a part of the road; and all road supervisors or persons having charge of the same, in the respective districts or villages, shall work the same as provided by law."

Section 1482 provides: "The board of supervisors has the general supervision of the roads in the county, with power to establish, vacate and change them."

Chapter 13, title 5, of the Code, deals only with cities and towns, and section 917 of this chapter provides that when a plat has been filed, and streets designated therein, the acknowledging and recording of the plat will be equivalent to a deed, in fee simple, to such portion of the premises platted as is set apart for streets, or other public use.

The filing of a plat and dedicating of a highway in a village, not incorporated, does not convey to the village the fee title. The public only acquires, by reason of the plat, an easement, a right to use for public purposes. The fee remains in the original owner, and, when vacated, reverts to the original owner.

In this case Carl deeded the east thirty acres to the plaintiff. This included fifty-six feet of the road known as Fred street. In this road the public had an easement. The title passed subject to that easement. Upon vacation, the easement was removed. The title remained in the grantee. The deed to the defendant of the plat of land, including the streets and alleys, was subsequent to the deed to the plaintiff. It was a quitclaim deed, and passed to the defendant only such rights as Carl had in the land at the time the deed was made.

An easement does not affect title. The title exists subject to the easement. The easement being removed, the title remained, relieved of the easement. Both parties claim through Carl. Carl held the land subject to the easement existing by virtue of the road. When Carl conveyed his title, the conveyance was subject to the easement. It is conceded that the road was vacated. The easement was therefore removed. Each party, under his conveyance from Carl, took his title to the land conveyed, subject to whatever easement existed in the land conveyed. Whatever portion of Fred street was on the land conveyed to plaintiff, there was an easement to that extent. Whatever was conveyed to the defendant was subject also to the easement. Both parties claimed that the road was vacated. Therefore it follows that each party took so much of the land as was conveyed in his deed, relieved of the easement existing in the road. Plaintiff's deed was first in point of time, and conveyed to him the east thirty acres, subject to an easement of fifty-six feet for Fred street. Or, in other words, there was an easement on the land purchased by plaintiff, of fifty-six feet for the road which was removed by the vacation of the road.

It is elementary that where a highway is established across land, the fee remains in the owner. The effect of such establishment is that the public at large obtains the privilege of passing over it, subject to this privilege, however: All rights in the land remain in the original owner. See *City of Dubuque v. Maloney*, 9 Iowa, 451; *Overman v. May*, 35 Iowa, 89; 3 Kent's Commentaries, 432; 10 Am. & Eng. Enc. of Law, 398; *Dickinson County v. Fouse*, 112 Iowa, 21.

It follows therefore that the plaintiff, having purchased the east thirty acres, took the same subject to an easement created by the establishment of the road known as Fred street, and that his title to the land, covered by the easement passed to him from Carl immediately upon the execution of the deed, subject to this easement. The road having been vacated, the easement was removed, and he, therefore, is entitled now to

the possession of so much of the land as was originally covered by the easement.

We think, therefore, the court erred in holding that he was entitled to only thirty feet of the east half of Fred street, but should have entered a decree, in favor of the plaintiff, for the east fifty-six feet of what was formerly known as Fred street. The case is therefore reversed and remanded, with directions to enter a decree in accordance with this opinion. —*Reversed and Remanded.*

LADD, C. J., and DEEMER and WITHROW, JJ., concurring.

MARIE FINNANE, Appellee, v. CITY OF PERRY, Appellant.

Municipal corporations: SIDEWALK ACCIDENT: NEGLIGENCE: INSTRUCTIONS: PREJUDICE. The instruction in an action for a sidewalk injury that plaintiff must recover, if at all, on the ground of the negligence alleged in the original notice, which stated that defendant had permitted the walk to be in a defective condition, in that it was broken, uneven and covered with ice and snow; and that the allegation in the petition that the city had permitted the walk to be improperly constructed, with the surface broken so that it was slippery from melting snow and ice, or from want of proper drainage, constituted a cause of action not to be considered because not commenced within the proper time, was not prejudicial to defendant although plaintiff might have properly complained thereof.

Same: NEGLIGENCE OF CITY: EVIDENCE. In this action for injuries caused by stepping upon an alleged broken and uneven sidewalk, covered with ice and snow, the evidence is reviewed and held sufficient to require submission of defendant's negligence and to support a verdict for plaintiff.

Same. Evidence that ice accumulated on all walks of the city from melting snow during the season in question, even if the walks were well drained, and that it was impossible with ordinary diligence and usual methods to keep any sidewalk free from ice was properly excluded, although it might have been admissible had it been offered with respect to the particular walk in question.

Same: REMOVAL OF SNOW AND ICE: DUTY OF CITY: INSTRUCTIONS. A
4 city is not required to remove all snow and ice from its walks, but must use ordinary and reasonable care to remove defects arising out of conditions occurring after snow has fallen. The instructions regarding the duty of the city to keep its walks in a reasonably safe condition when construed as a whole present the true rule and were not prejudicial in character, nor objectionable as shifting the burden to defendant to show that the walk in question was in a safe condition for use.

Appeal: MOTION FOR DIRECTED VERDICT: WAIVER. Where a defendant
5 proceeds to introduce its evidence, after the overruling on a motion to direct a verdict at the close of plaintiff's case, it cannot complain of the ruling on appeal.

Appeal from Dallas District Court.—HON. LORIN N. HAYS,
Judge.

WEDNESDAY, FEBRUARY 18, 1914.

ACTION at law to recover for injuries sustained by plaintiff while passing along and over a sidewalk in defendant city, which was covered with ice and snow. In addition to a general denial, defendant pleaded that the action was not brought in time, and that plaintiff gave no preliminary notice, as by statute provided. On these issues the case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$250, and defendant appeals.—*Affirmed.*

H. S. Dugan, for appellant.

White & Clarke and *Giddings & Blake*, for appellee.

DEEMER, J.—The accident occurred upon one of the public and much frequented, residential streets in the defendant city on the 13th day of February, 1912, and an original notice of the suit was served on May 13, 1912. The original petition was filed on May 14, 1912, and the grounds of negligence pleaded therein were as follows:

That the defendant permitted said sidewalk to be constructed with the surface thereof sloping so that the same was made slippery by melting snow and ice. That, during the several weeks immediately prior to the injury herein alleged, large quantities of snow and sleet had fallen and banked upon said walk and had partially melted and become packed and frozen in such a manner as to have an uneven surface and to lay in ridges in rounded form so that the said sidewalk was slippery and dangerous to pedestrians. That the defendant was negligent in permitting said sidewalk to be so constructed and in allowing the snow and ice to accumulate from and remain thereon in the dangerous condition hereinbefore described.

Defendant pleaded that the action was barred because not commenced within three months from the time of the accident, and that the original notice was not sufficient to meet the requirements of section 3447, paragraph 1, of the Code of 1897. Demurrer to this answer was sustained. Thereafter, and on November 15, 1912, plaintiff filed an amendment to her petition, claiming additional damages, and at a proper time defendant insisted that this amendment could not be considered. The original notice we have been unable to find in the record; but in its instructions the court said to the jury that the action was commenced in time, although the jury should confine its investigations to the grounds of negligence stated in this notice, which were said to be:

1. MUNICIPAL
CORPORATIONS :
sidewalk acci-
dent : negli-
gence : instruc-
tions : prejudice.

That the defendant had permitted its sidewalk at the point in controversy to become in a defective condition in that the same was broken, uneven, and covered with ice and snow. These allegations in plaintiff's notice must be held to be the charge of negligence against the defendant on which and for which the plaintiff must recover against the defendant, if at all. (The court further instructed.) That as to the other allegations in the plaintiff's petition that the defendant has permitted the sidewalk in question to be improperly constructed with surface thereof broken so that the same was made slippery by melting snow and ice, or from want of

proper drainage, and that by reason of such defective construction, as charged in said petition, you are instructed that such allegation would constitute a ground or cause of action against the defendant, and that the cause of action thereon was not commenced within three months from the happening of the alleged injury, and that the same is now barred. You will therefore, in your further consideration of this case, consider only the act of negligence set forth and charged in said notice, and as the same are heretofore set forth as a basis for a recovery.

Some complaint is made by defendant of these instructions, but the complaint is without merit. The instructions are clear, and the jury could not have been misled thereby. The prejudice, if any, was to the plaintiff, but she is not complaining; and, as the original notice is not in the record, we must assume that the court below properly interpreted it. The plaintiff might well complain of this instruction; but it was evidently nonprejudicial to the defendant.

II. The accident occurred on the south side of Warford street, between Third and Fourth, and about fifteen feet west of Fourth street, and the plaintiff described the condition of the place as follows:

The accident occurred while I was walking west over the sidewalk about half past nine in the forenoon. The walk was covered with a light fall of snow, and the walk was in ridges or bumps covered with ice which was smooth on top. I did not know of the condition of the walk at the time I went upon it. The snow on the walk was between an inch and two inches deep. The walk at the particular place where I fell was uneven. The edge of the walk was pushed up by a tree growing near by, and the walk was in a slanting position. There was a sloping terrace about three or four feet high on the south side of the walk. The terrace was close to the walk, and there was no level ground between them. I was walking along and slipped backward, which gave my head a jerk, and I fell on my right elbow.

2. SAME: negli-
gence of city:
evidence.

Other witnesses testified as follows regarding its condition at or about the time of the accident, and before and after, and we here quote some of their testimony from the record. One said:

I was along there between the 1st and the 18th of February. I traveled over the walk twice during that time. I do not know the exact time, except it was between the 1st and the 18th of February. There was about two weeks between my trips over this walk, and my last trip was not later than the 18th of February. The first time I went over the walk I noticed the condition of the walk, and it had snow and ice on it. At that time I was going east from Third to Fourth street, and the walk was rough in places. It was rough toward the east end. It was also slick. The last time I went over the walk there had been some snow, but it was rough, and the place was slick so it was difficult for me to get over. On the last time that condition of being rounded up, smooth, and slippery continued as I had seen it before. I do not know how long that snow and ice had been on the walk. There was ice on the walk and snow over it. This condition extended over quite a little strip of the walk just west of Fourth street and on the south side of Warford. There was more snow on the walk the last time I crossed it than the first time. It appeared to be thawing. It was not thawing the first time. The water that thawed out of the snow appeared to stay mostly on the walk. There was snow on the walk that day. I could not say how much but enough to cover the ice. The snow was level and had footprints in it. I could see the ice through the prints. The ice was slick in some places, but I do not remember what part of the walk that was on. There was no fresh snow that day. It might have snowed a little bit the night before, but there was no snow on this day. In some places the ice was smooth and in others it was not. The smooth places were where it was kind of raised up where the water ran over it.

Another testified:

Last winter during January and February I frequently passed over the walk on the north side of the Pattee place on

Warford street. I might have passed there as often as once a day. I am acquainted with the members of the city council of the city of Perry and know the men who were on the council last February. Mr. Charles Marckres is a member of the board. His home is the next place east directly across the street from the Pattee place. I do not know whether or not he was in the habit of walking along the south side of Warford street in going to his home or not. Mr. Rouse is also a member of the city council. His home is the second block east and one block south of the Pattee home. I am acquainted with E. Kelley, who is a member of the city council. Mr. Kelley is in the stock business, and I have seen him driving up and down the street at different times. I remember about the time the snow commenced to fall in Perry last winter. I think it was during the holidays and about Christmas time. I know there was snow on the ground Christmas day. That first snow and the additional snow that fell remained on the ground all winter. Prior to the first fall of the snow there was ice on the sidewalk. This condition was pretty general all over the city. I could not say whether or not there was snow or ice on the sidewalk north of the Pattee home during the middle of February last winter. The snow and ice on the lawn and terrace of the Pattee home drains, when thawed out, to the northwest onto the sidewalk adjacent to the terrace. There is no gutter or drainage provided for either side of this walk. The sidewalk slopes toward the west; that is, is downhill to the west.

And still another gave this evidence:

I live on south side of Warford street. I go up that side of the street more than I do the other, four or five times a day during last January and February. I walked up whichever side I got started up and stayed on it. I think the snow commenced falling in December. I think there was snow on the ground Christmas. Part of that snow stayed on until spring. The ground was covered continuously. There was ice on the sidewalk in question last winter, but I don't know what time. Part of the snow stayed on all winter. The condition of the sidewalk, lawn, and terrace is the same as the picture shows. The drainage is north onto the sidewalk. Q. On this sidewalk, this Pattee's sidewalk, there was snow on the

sidewalk? And it was thawing and drained down onto the walk—now what effect would that have on the snow as to making it soft and slushy? A. It would make it wet and slushy. Q. What is the fact as to there being travel over that snow and working it up into ridges and bumps, if you know? A. Make it rough. Q. What is the fact as to the extent or amount of travel back and forth over that sidewalk? A. There was considerable travel over it; I don't know how much. I think it is one of the main thoroughfares, and there are churches near, and the accident happened west of Fourth street, about two blocks from the main street.

Aside from some testimony relating to the nature and extent of plaintiff's injuries, and some other matters not material to the points made for defendant,
3. SAME. this is plaintiff's case. Among other things, when introducing its testimony, defendant made the following offer:

Defendant offers to prove that the conditions existing in the city of Perry last winter—that all sidewalks, even if well drained, that ice accumulated thereon from the water that would melt from the banks of snow along the sidewalk, and that it was impossible with ordinary diligence and the usual methods to keep any sidewalk free from ice. The court rules that such evidence is incompetent. Exception taken to ruling.

The record shows, however, that the city was permitted to prove its efforts to keep the sidewalk in question in repair, and its care with reference thereto. The mayor testified to having inspected the walks of the city during the winter of 1911-12, and that he went over the walk where the accident occurred some time in February, although he could not give the exact date. He further said that he was over the walk, where plaintiff fell, on tours of inspection every two weeks, and was certain that he was over it twice in January and as many times in February. Defendant contends that the court was in error in denying the proffered testimony, claiming that it would show ordinary care on the part of the city, and that

the city could not be held liable for failure to do the impossible. Had the testimony been directed to the particular walk in question, it might have been admissible, but being omnibus in character, and covering all of the sidewalks of the town, we do not think it was either material, relevant, or competent.

The city was not bound to remove all snow and ice; but it was required to use ordinary and reasonable care to remove defects arising out of conditions occurring after the snow had fallen. This point seems to be covered in *Lindsay v. City of Des Moines*, 68 Iowa, 368; *Ford v. City of Des Moines*, 106 Iowa, 94; *Huston v. City*, 101 Iowa, 33.

4. SAME: removal of snow and ice: duty of city: instructions.

III. The trial court gave the following, among other, instructions:

(9) Cities and towns are not insurers of the safety of travelers upon their streets and sidewalks. It is their duty, however, and it was the duty of the defendant, to have kept its walk in a reasonably safe condition for persons desiring to pass over them, to pass in safety, by the use of due care and prudence on the part of said pedestrians in passing over said walk, and if the plaintiff has shown by a preponderance of evidence, as herein defined to you, that while she was exercising ordinary care and prudence, and without any negligence on her part contributing to the injuries complained of, by reason of the negligence of the defendant, as charged in her petition, and as submitted to you herein by the court, she was injured by reason of the defendant permitting snow and ice to be and remain on the walk referred to in the plaintiff's petition in such a rough, rounded, and uneven condition as to render such walk dangerous to persons passing over the same in the exercise of ordinary care and prudence, then in such a case the defendant would be liable to the plaintiff for whatever injury the evidence has shown she has sustained by reason thereof, providing that you further find that at the time and prior to the time of the said injury the defendant had knowledge of such defect complained of or by the exercise of ordinary care and prudence it should have known of such defect in time to have remedied the same and thereby prevented the injury.

(10) The fact, if it be a fact, that ice and snow has been permitted to accumulate on the walk of a city from natural causes and may have been permitted by the city to remain thereon for a considerable length of time, and though slippery, because of the smoothness of the surface, does not constitute such a defect alone for which a city may be held responsible for an injury resulting to a pedestrian thereon. It is only where such snow and ice are allowed to remain upon the walk until by its being trampled upon by pedestrians, freezing and thawing, or from other causes the surface of such snow and ice becomes rough, ridged, rounded in such a manner that a person in the exercise of ordinary care could not pass over it without danger of falling, that the defects are such as to render the city liable. There is no duty resting on the city to remove snow and ice from the sidewalk so long as the snow and ice remain unchanged by the interference of man, or from other artificial causes by which the snow or ice become ridged, uneven, or is made to assume some other form or present some other danger than it would have presented solely from natural causes. And if you believe from the evidence produced upon the trial hereof that, at the time plaintiff fell upon the sidewalk in question, the sidewalk was covered with snow and ice, and that the same was unbroken and smooth and even as it had fallen upon said sidewalk, then the plaintiff would not be entitled to recover in this action, and you should find for the defendant.

The first of these, No. 9, is complained of, because in the first paragraph the jury was instructed that it was defendant's duty to keep the walk in a reasonably safe condition. If this phrase stood alone, doubtless the instruction would be erroneous; but, taken as a whole, it presents the true rule, and it was not prejudicial in character. *Lindsay v. City*, 74 Iowa, 111.

Instruction No. 10 does not, as defendant contends, shift the burden upon it of showing that the snow and ice were unbroken, smooth, and even. The instruction has no reference to the burden of the proof. That matter was covered by other instructions which are not quoted.

Instructions stating the issues are complained of, but

these complaints are without merit. They succinctly state the issues, and, even if not as concise as they might have been, the other instructions clearly presented the very matters to be decided by the jury.

IV. Defendant filed a motion at the close of plaintiff's testimony for a directed verdict. This was overruled, and complaint is made of the ruling. As the city did not stand on the ruling but proceeded to introduce its testimony, it cannot now complain of the ruling. *Andreas v. Hinson*, 157 Iowa, 43; *Frum v. Keeny*, 109 Iowa, 393, and cases cited. Again it is said the verdict is without support in the evidence. It must be conceded that the testimony is not strong; but we think there was enough of it to justify the submission of the case to a jury, and with its verdict we should not interfere.

No prejudicial error appears, and the judgment must be, and it is, *Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

ELIZABETH HAYNES, Appellee, v. MINNIE ROLSTIN, C. E. ROLSTIN, EDNA R. LANDERS, PERRY H. LANDERS, SANFORD G. HAYNES, GOLDIE H. HAYNES, ROY L. HAYNES, GLADYS H. HAYNES and IDA R. HAYNES, Defendants.

HENRY FRANZEN, — FRANZEN, CLARENCE M. HAYNES and FLORA E. HAYNES, Appellants.

Dower: PURCHASE MONEY MORTGAGE. A widow is entitled to have her one-third interest in the estate of her deceased husband set apart to her free from a mortgage which was on the property when purchased and assumed by the husband, provided there is sufficient other property to pay the indebtedness.

Appeal from Madison District Court.—HON. W. H. FAHEY, Judge.

WEDNESDAY, FEBRUARY 18, 1914.

PROCEEDING to have set apart to the widow one-third in value of the real estate, to include the homestead, free from claim for purchase-money indebtedness. From a decree in favor of plaintiff, the defendants appeal.—*Affirmed.*

W. S. Cooper, for appellants.

J. P. Steele, for appellee.

WITHROW, J.—In December, 1911, M. D. Haynes died intestate, seised of eighty acres of land upon which there were at the time two mortgage incumbrances; the first for \$1,000 being for a part of the purchase money, it having been assumed by Haynes at the time of purchase, and the second for \$400, given to secure indebtedness incurred after the purchase. Upon his death he left as survivors his widow, the appellee, and seven children, three of whom at the time of the commencement of this action were minors, all of whom are made defendants. The widow, Elizabeth Haynes, in this action sought to have set apart to her in her own right one-third in value of the real estate, including the homestead, claiming that she was entitled to have all sold, and that the mortgage claims should be paid from the proceeds of that outside the homestead before it should be subjected to any part of the indebtedness. The defendant claimed that \$1,000 of the mortgage indebtedness was assumed as part of the original transaction of purchase, and that the widow's right in the real property was only in such as remained after payment of the purchase-money indebtedness, which should be from the entire proceeds. Upon the trial the facts were conceded as set out in the pleadings, and as are contained in the foregoing statements. The trial court found that at the time of his death M. D. Haynes was occupying the property as a homestead, and that since his death his widow, the plaintiff, has continued

to so occupy it. It was decreed that she was entitled to have set off to her the one-third in value of the land, so as to include the residence and buildings, and that the mortgages should be paid out of the proceeds of the remaining two-thirds. From such decree the defendants appeal.

Stated concisely, the claim of appellants is that, when real estate is purchased subject to an existing mortgage, which is assumed, and is therefore a part of the purchase money, upon the death of the husband the widow's right as to dower, including the homestead, attaches only to that which remains after payment of the purchase-money indebtedness. As thus presented the question has never been directly before us for decision. By many previous decisions of this court it has been held that the dower interest in real estate attaches subject to the superior right of a purchase-money mortgage, and that the widow is not entitled to assert it as against the prior claim based upon a purchase-money lien. *Thomas v. Hanson*, 44 Iowa, 651; *Kemerer v. Bournes*, 53 Iowa, 172; *Noyes v. Kramer*, 54 Iowa, 22; *Snyder v. Richey*, 150 Iowa, 737. But in the cited cases the question as to rights of the widow when dower is sought to include the ~~homestead was not involved~~ nor considered. There were only the questions of the rights of creditors or purchasers. The present case seeks no impairment of the rights of the mortgage creditors to have their liens satisfied from the real estate, but, as between the widow and the heirs, asks to have the interests of the latter first subjected to the purchase-money lien, before the homestead in which dower is asked shall be subjected to any part of the claim.

It is a rule, often stated by this court, that when a widow elects to take her distributive share under the law, which embraces a part or all of the homestead, the property other than that set apart to her must first be subjected to a mortgage lien upon the whole premises, her share being liable only for the deficiency. *Wilson v. Hardesty*, 48 Iowa, 515; *McGlothlen v. Hite*, 55 Iowa, 392; *Bissell v. Bissell*, 120 Iowa, 127. The policy of the law is to protect the homestead in so far as

*June only so
to
homestead*

such may be done without lessening the superior rights of creditors. In so doing it not infrequently occurs that the interests of the heirs are largely reduced, but as stated in *Trowbridge v. Sypher*, 55 Iowa, 357, "it is deemed justifiable on account of the necessity of affording the widow protection when she is powerless to protect herself." The real property involved in the present proceeding was, from the time of its purchase, in part occupied as a homestead. Passing for the moment the question of purchase-money lien, had the mortgagee sought foreclosure during the lifetime of M. D. Haynes, the latter, with his wife, had the right to insist that the property outside the homestead should first be exhausted. Code section 2979. *Twogood v. Stephens*, 19 Iowa, 405; *Bissell v. Bissell*, *supra*.

The *Twogood* case, *supra*, was a proceeding which, among other questions, considered that of the right of the wife in real estate in the conveyance of which she had not joined. Her husband, Stephens, had purchased 360 acres of land from the school fund commissioners, giving in payment one-fourth of the purchase money in cash, and his note for the balance, under an agreement that deed was to be delivered when the consideration was fully paid, reserving in the commissioner the right to forfeit the contract and resell the land in case of default in payment of the balance of the purchase money. Failing to pay, judgment was procured against the purchaser. Another judgment creditor levied upon the purchaser's equitable interest in the land, and bid it off for the amount of his claim and costs. Questions arose as to the right of redemption from the purchase-money judgment, and the homestead right of Stephens and wife in the house and forty acres was interposed. In considering the rights of the parties this court then stated: "As respects the rights of Stephens and wife, they consist in holding the homestead of forty acres, subject to pay any balance there may be on the school fund judgment after first exhausting the other land." The school fund claim was for purchase money. If the right existed in husband and

wife to occupy and hold the homestead as only secondarily liable for the purchase-money indebtedness, it was because such right attached to the entire tract so occupied, and not to the fractional remainder after deducting the pro rata portion of the indebtedness. Such right then existing, it would follow that upon the death of the husband the homestead rights held by him would, by operation of law, pass to his widow, and, subject only to its secondary liability for purchase-money lien, would, in the admeasurement of her dower right so as to include the homestead, pass to her free from the claim of the indebtedness. We conclude that the decree of the trial court was right, and it is *Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

C. M. BROWN, Appellee, v. CITY OF SIGOURNEY, IOWA,
Appellant.

Municipal corporations: STREET GRADE: ESTABLISHMENT: DAMAGES.

The only method of establishing the grades of city streets is by an ordinance for that purpose, it cannot be done by the mere act of the city officials in lowering or raising the grade; and until a grade has been established by ordinance the city is liable to adjacent property owners for injury resulting from a change of the surface of the street.

Appeal from Keokuk District Court.—HON. K. E. WILLCOCKSON, Judge.

THURSDAY, FEBRUARY 19, 1914.

APPEAL by defendant from judgment granting mandatory injunction requiring the defendant to remove obstructions to the flow of surface water from plaintiff's lot.—*Affirmed*.

W. C. Gambell, for appellant.

F. L. Goeldner, for appellee.

WITHROW, J.—Plaintiff is the owner of lot 1 in block 1 of Hogan's addition to Sigourney, which is a city of the second class. His lot is bounded on the north by South street, on the east by Crocker street, and on the south by Valley street. The natural slope of his lot is to the northeast, that corner of the lot being many feet lower than the south part. It appears in the evidence that up to the time complained of by plaintiff there had been maintained a culvert across South street which afforded drainage and outlet for the water which flowed upon plaintiff's lot from a tract to the south, and from Valley street and Crocker street. It also appears that in the spring of 1910 and subsequently the city of Sigourney, by its street commissioners and laborers, raised the surface of South street, removed the old culvert, and at or near where it had been placed a tile culvert, which, however, was higher than the one which was replaced, and which elevation, together with the added height to the street, prevented the flow of surface water from the north side of plaintiff's lot, thus causing it to accumulate, and prevented its cultivation and use.

The foregoing statement of the facts is the substance of plaintiff's complaint, upon which he bases his right to recover damages and a claim for a mandatory injunction directing the city of Sigourney to remove from its street the obstruction to the free flow of water from plaintiff's premises. The cause was tried to the court. No damages were allowed, but mandatory injunction was granted as prayed. From such the defendant appeals.

The facts as shown by the record sustain the conclusions reached in the first division of this opinion. From the argument of appellant, we find that its reliance is upon the proposition that the city is not compelled to afford drainage for the

plaintiff's lot while the same is below grade, and does not seriously dispute the findings of fact upon which the trial court must have based its judgment and order.

The statement of appellant's position, which is made in different ways, in the end resolves itself into the proposition given above, and which includes in it the averment that the lot is below grade. This latter, however, is not a question of disputed fact in this case, but one of law. It is clear that, prior to raising the surface of South street and placing the tile culvert across it, and some work on Crocker street which tended to increase the flow of water on to plaintiff's lot, there had been no interference with the natural drainage of the surface water from plaintiff's lot.

So far as the record shows there is no established grade for the streets of the city of Sigourney. Such cannot be done by action of the city through its officers in changing the physical height of the street, either by lowering or raising, but only by means of an ordinance. *Caldwell v. Nashua*, 122 Iowa, 179, and cases cited. When the grade is so established, streets may be changed in their height to conform to it without creating liability for resulting damages. But, until a grade is so established, a city may not make changes in the surface of the street resulting in damages to adjacent property owners without being liable for the same. *Trustees v. Anamosa*, 76 Iowa, 538; *Caldwell v. Nashua*, *supra*.

This proceeding clearly comes within the rule of the cited cases. None of the cases referred to by appellant state a different rule. Many of them but state the recognized right to recover damages resulting from a change of grade, having no reference to conditions caused by a change of surface where there is no established grade.

The judgment of the trial court was right, and it is *Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

JOHN F. DALTON and JOHN B. WALTON, Plaintiffs, v. CALHOUN COUNTY DISTRICT COURT and F. M. POWERS AS JUDGE OF THE DISTRICT COURT OF CALHOUN COUNTY, IOWA, IN THE 16TH JUDICIAL DISTRICT, Defendants.

Certiorari: NOTICE OF HEARING. Where no stay of proceedings in the
1 lower court was demanded under a writ of certiorari, service of notice of hearing upon the court below was not a condition precedent to the issuance of the writ.

Evidence: PRODUCTION OF BOOKS AND PAPERS: SUFFICIENCY OF APPLI-
2 CATION. The application for an order requiring the production of books and papers for the inspection by the opposite party must disclose the fact that the desired evidence is material to some issue in the case; but this requirement may be satisfied by a detailed statement of what is expected to be proved, although there is no direct averment of materiality.

Slander and libel: PRODUCTION OF EVIDENCE: MATERIALITY. The books
3 of a newspaper office, showing the circulation of the paper in which an alleged libel was published, are material on the question of the extent of the injury sustained, and an order for their production should be granted.

Same: CERTIORARI: APPLICATION OF WRIT. Where the court had
4 jurisdiction of the subject matter and the parties in a suit for libel, an order for the production of defendant's books showing the circulation of the paper in which the alleged libel was published is not reviewable by certiorari; as there is a complete remedy in such cases by appeal. It is only where the court has acted illegally that certiorari is available.

Same: PRODUCTION OF EVIDENCE: DISCRETION. Although the answer
5 in an action for libel, and the objections to an application for the production of defendant's books showing the circulation of the alleged libel, admitted the extent of the circulation of the newspaper as broadly as charged in the petition, it was still within the proper discretion of the court to require the production of the books.

Same: CONSTITUTIONAL LAW: UNREASONABLE SEARCH AND SEIZURE.

6 An order for the production of books and papers is not a violation of the constitution prohibiting an unreasonable search and seizure.

Evidence: PRODUCTION OF BOOKS AND PAPERS: DISCRETION. The right

7 to a rule requiring the production of books and papers is not to be used as a means of acquiring knowledge of a competitor's business, which will afford an unjust advantage; but in granting the rule it will be presumed that the court in the exercise of its discretion will permit no examination or discovery not required for the purposes of the case, and that the rights of both litigants will be safeguarded.

Appeal from Calhoun District Court.—HON. F. M. POWERS,
Judge.

THURSDAY, FEBRUARY 19, 1914.

PROCEEDING in certiorari.—*Affirmed.*

John W. Jacobs, and Healy, Burnquist & Thomas, for plaintiffs.

M. W. Frick, and Casper Schenk, for defendants.

WITHROW, J.—The plaintiffs in this proceeding are the defendants in a civil action for libel brought by T. D. Long in the district court of Calhoun county. The alleged libel consisted in the publication in the Manson Democrat of certain matter concerning the plaintiff which is alleged to be defamatory and untrue. In his answer, J. F. Dalton admitted his ownership of the "Democrat," and also the publication of the article which is the basis of the action, but says that it was written by his codefendant, J. B. Walton. The latter in his answer admitted that he wrote and caused to be published in the "Democrat" the article of which complaint is made, and that it was true. He pleads that the statements and averments in the alleged libelous article was

legitimate reply to charges, accusations, and assaults made against Walton by Long in the columns of the Manson Journal, a newspaper owned and published by T. D. Long. He pleads that he has not in his possession nor under his control the articles referred to, but states that they appeared in various issues of the Manson Journal, and will be found in the files of that paper. The answers were filed during the May, 1913, term of court. We need not further notice the pleadings, excepting as to one averment of the petition and statements in the answers which have bearing upon the question raised in this proceeding. During the May term of the court the defendants in the main action filed a petition under the statute for the production of books and papers, in which they asked that the plaintiff, Long, be required to produce in court for the purpose of examination by the defendants all copies and files of the Manson Journal for the several years in which Walton complains there appeared unjust attacks against him. Prayer was also made for the production of the books and records showing the names of the subscribers to the Manson Journal from and after March 6, 1912. To this petition resistance was filed by T. D. Long, many grounds of objection being stated. At the same term of court Long filed a petition for the production of books and papers, praying an order requiring the defendants in the libel suit to produce all books, memoranda, or papers showing the mailing or subscription list of the "Democrat" on March 6, 1912, "to be inspected or copied by plaintiff or his attorneys," and stating from such lists he expected to show the general circulation of the alleged libelous article in nearly every state in the Union, to Senators and Representatives in Congress, to prominent men in Iowa, and to public libraries and reading rooms. Service of notice of such application was accepted by the attorneys for Walton and Dalton. On May 13, 1913, the trial court ruled upon several motions, objections, and applications which had been filed in the case, and also entered an order requiring the plaintiff to produce the copies and files of the Manson

Journal for the years 1910, 1911, 1912, and 1913. October 20, 1913, an order was entered requiring the defendants to produce for the inspection of the plaintiff the subscription or mailing list of the "Democrat." The petitions on the part of each were so comprehensive in their desires that had they been granted in full each of the publishers would have secured detailed information of his rival's business; but the trial court in its rulings limited the inspection to that which we have stated. Upon such order being entered, following the last ruling the defendants in the main action sued out of this court on October 28, 1913, a writ of certiorari to which the presiding judge made full return on November 3d, pending hearing on which the cause below was continued, granting to plaintiff thirty days to plead to amended and substituted answers which were filed during the October term.

The particular manner in which it is alleged that the trial court exceeded its jurisdiction in entering the order of which complaint is made is stated as follows: (1) That no issue was tendered warranting the sustaining of the petition for the reason that complainant Dalton in resistance to the petition admitted every allegation of fact intended to be shown by the mailing list. (2) That such order is illegal because before it may be granted the opposite party must be permitted to show cause why it should not be granted. (3) That it was not shown that the mailing list of the Manson Democrat was material in making out the cause of action. (4) That its effect was to put into the hands of a rival the business secrets of complainant. (5) That it invades the constitutional rights of the complainant, as he is exempt from unreasonable seizures and searches, and is entitled to be secure in his property. (6) That the order was not based upon any proper showing or proceeding. (7) That the provisions of the statute do not warrant such an order nor confer upon the court jurisdiction to make it.

In the original petition it is charged that John F. Dalton is the owner, editor, and publisher of the Manson Democrat,

“said periodical having an extensive general circulation in said county, throughout the state of Iowa and elsewhere.” The answer of Walton admits that the “Democrat” is a newspaper of general circulation published in Manson. That of Dalton admits ownership of “The Democrat,” a weekly newspaper having a general circulation in Calhoun county and elsewhere in the state of Iowa. In the petition of Long for production of books and papers, he avers “he expects to prove by said mailing list that the libel complained of was sent to persons in nearly every state of the Union, to Senators and Representatives in Congress, to men prominent in Iowa political and social circles, to various public and college libraries and reading rooms, to business men with whom plaintiff had business, to hundreds of personal acquaintances, and thousands of others. Plaintiff expects to show by said list that he has been humiliated and defamed publicly and privately in the eyes of men and women whose good opinion he values because of their position in financial, social, political, and religious circles, and that said defamation in some of said instances has been filed away as a permanent record for all future time.” In their objections to granting the petition the defendants admitted the circulation and distribution of the publication as broadly as is above pleaded. From such record it is claimed that upon the particular question thus presented there was no issue, and that in requiring the production of proof to establish that which was not in dispute the trial court exceeded its jurisdiction and acted illegally. Keeping in mind the rule that the remedy by certiorari is not to correct errors committed by a court having jurisdiction of the parties and of the subject-matter, but only to inquire into cases where it is alleged the inferior tribunal has exceeded its proper jurisdiction or has acted illegally, we must ascertain under this record whether that which is the subject of complaint in this division of the opinion was an error of the trial court acting within its power, or was illegal or in excess of its jurisdiction.

I. Preliminary to this question we give attention to the objection of defendants as to our right to consider the case. It is claimed that this proceeding is not properly in this court, and cannot be heard, for the reason

1. **CERTIORARI:**
notice of
hearing.

that, where a stay of proceeding is demanded under a writ of certiorari, a notice of hearing served on the lower court is a condition precedent to the legal issuance of the writ. Such is the requirement of Code, section 4157; but we find it not applicable here. The petition for the writ, as presented to this court, did not ask for a stay of proceeding in the lower court, and although plaintiff's abstract, no doubt through inadvertence, recites that upon presentation of the petition one of the justices of this court issued an order staying the proceeding in the district court, an examination of the original files shows only a direction for the issuance of the writ, with no provision as to its effect upon the proceedings below. This objection is therefore without merit.

II. By Code, section 4654, it is provided that "the district . . . court may in its discretion, by rule, require the production of any papers or books which are material to a just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them." Under that section it is necessary that that which is sought to be secured be material to some issue in the case, and it is contended by the plaintiffs, and there is some authority for the claim, that the application for the order must affirmatively show the desired evidence to be material. The application presented to the trial court did not in terms state that the books were material, but it did state in detail what was expected to be proved from them, i. e., the distribution of the newspaper among people and to institutions which gave to the alleged libelous publication wide circulation among those whose good opinion was valued, and in some instances had been filed as a permanent record,

2. **EVIDENCE:** pro-
duction of
books and pa-
pers: suffi-
ciency of appli-
cation.

etc., and if material such was sufficiently shown by the pleadings in the main case, and by the application for the production of the books, even though such fact was not expressly averred. In considering a like question this court, in *Iowa Loan & Trust Co. v. District Court*, 149 Iowa, 66, said: "While the court is given discretion in the matter, it is the plain intent of the statute that no rule shall be granted unless it is made to appear to the court, either by the petition or upon a hearing where the issuance of the rule is resisted, that the books and papers are material to the issues then before the court." We think that the petition presented to the trial court was sufficient under the statute, followed as it was by a resistance to it in which that question was not raised, but the issuance of the order was combated on other grounds.

III. That evidence of the character sought to be secured would be material in an action for libel we think is clear. In the case of *Palmer v. Mahin*, 120 Fed. 737 (57 C. C. A. 41),

3. Slander and libel : production of evidence : materiality.

like this an action for libel, a petition which was in effect the same as that considered here was denied by the United States District Court for the Southern District of Iowa. Upon appeal to the Circuit Court the order was reversed, and in its opinion the following statement of the law appears:

The court denied the application of the plaintiff for a subpoena *duces tecum* to Harold Mahin, commanding him to produce in evidence at the trial the mailing lists, subscription lists, shipping lists, books, records, and accounts of the defendants which showed the extent and the places of the circulation of the Muscatine Evening Journal during the years 1892, 1894, 1895, and 1897, when these articles were published when it should have granted that application. The motion was founded on an affidavit of counsel for the plaintiff that Harold Mahin was in possession and control of these papers and books, and that they were material and necessary for the trial of the case. Their materiality and necessity in order to prove the plaintiff's damages are evident from the pleadings

themselves. He was entitled, in any event, to such damages as would fairly compensate him for the injury he had suffered from the publication of the articles in the Evening Journal. The extent of that injury was conditioned by the extent and by the locality of the circulation of the newspaper which published them. The shipping, mailing, and subscription lists of that paper, and its books of account with its subscribers, constituted the best, and probably the only definite, evidence of these facts. In actions for libel by publications in a newspaper, it is always competent for the plaintiff to prove the extent to which, and the locality in which, the paper containing the publications circulated.

The rule above stated in its general application has close bearing upon this case, not only as to the correctness of the order of the trial court, but also as to its jurisdiction to make it.

IV. Going to the merits: The cause in which this controversy arose was regularly pending before it, and it had jurisdiction of the parties and of the subject-matter. Any

relevant judicial act during the trial of the
4. SAME: certiorari: application of writ. cause or in making up the issues was therefore within its power and legal duty, and for error committed in that respect this remedy will not lie. If, however, while in the discharge of such duties the trial court, even with jurisdiction of the parties and of the subject-matter, proceeds in some manner contrary to law, the particular unlawful act may be then reviewed. *Tiedt v. Carstensen*, 61 Iowa, 334. It cannot be reasonably claimed that a ruling of the trial court upon the admissibility of evidence, as to whether it is material, may be reviewed by certiorari, for as to such a complete remedy is otherwise provided by law. At most, it would be an error and not an illegal act, and this distinction must be recognized as a controlling one in determining when the writ will properly lie. Recognizing as must be done that under the statute the trial court in the exercise of its discretion had the full power to order the production of books and papers when shown to be material to the cause, and also that in holding, as a basis for

the order, that they are material, it follows that an order granted under such condition is not subject to review by the method here invoked, unless it shall appear from other reasons urged by the plaintiffs that the court in so doing acted outside its lawful authority. *Iowa Loan & Trust Co. v. Dist. Court*, 149 Iowa, 66.

V. It is claimed, however, that as the answers admitted as broadly as stated in the petition the averments as to the extent of the circulation of the newspaper, and that as the objections to the application for the order likewise admitted as fully as stated in the applications the statements as to its circulation and distribution, there was therefore no issue upon which the desired books could be offered as material evidence. It is to be determined whether, under an issue such as was presented to the trial court in the main case, an admission in the answer or in subsequent pleadings will be sufficient to deprive the plaintiff of his right by competent evidence to prove his cause when that admission does not reach to the entire cause of action, but only to an element necessary to be proved to establish it. As to the admitted averments there can be no question that the plaintiff may rely upon them and not offer proof. Our cases have not considered this question, but there are many authorities upon the subject which state a safe and just rule. In *Baumier v. Antiau*, 79 Mich. 509 (44 N. W. 941) it was held that an offer by defendant to admit plaintiff's claim as to a material fact did not deprive the plaintiff of the right to present proof to the jury in his own way, subject to the rules of evidence; that such was a substantial right of which the proffered admission could not deprive him. That case was followed in *Michigan Paper Co. v. Electric Co.*, 141 Mich. 48 (104 N. W. 389). The rule is recognized in *Dunning v. Maine Central R. R.*, 91 Me. 87 (39 Atl. 352, 64 Am. St. Rep. 208); *State v. Powell*, 5 Pennewill (Del.) 24 (61 Atl. 966); *Jones v. Allen*, 85 Fed. 524 (29 C. C. A. 318); *Life Ins. Co. v. Moore*, 34 Mich. 41; and in Thompson on Trials, section 361, it is given as being within

5. SAME: produc-
tion of evi-
dence: discre-
tion.

the discretion of the trial court whether upon such admission further evidence upon that point may be introduced. We are of opinion that it is within the discretion of the court to make the order, under the rule above given, and such is not reviewable in the proceeding.

VI. It is further claimed by the plaintiffs that the object sought to be accomplished constituted an unreasonable search and seizure of the private books and papers, and that

6. SAME: constitutional law: unreasonable search and seizure.

it was in violation of their rights guaranteed under the Constitution. Without discussion, it has been held by this court that such proceedings do not come within that protective provision, which as a rule has reference to criminal or *quasi* criminal proceedings, or to forfeiture and not the statutory methods for obtaining evidence. *Finn v. District Court*, 145 Iowa, 166; *Iowa Loan & Trust Co. v. District Court*, 149 Iowa, 71.

VII. It is urged generally that by this procedure there is placed within the reach of a rival in business means of knowledge as to his competitor's business affairs which give

7. EVIDENCE: production of books and papers: discretion.

to him an unjust advantage. While we recognize the right of one to preserve in secrecy his own affairs, so far as knowledge of them may not properly be required in the public interest or in the assertion of private rights, yet the governing principle as to such is stated in the cases cited in the previous division of this opinion; and we must presume that the trial court in exercising the discretion granted to it in such matters, and in the fairness which may be expected to control its acts in the matter, will permit no examination or discovery not necessary to the case, nor want in proper regard for the rights of both litigants.

From the conclusions reached it follows that the ruling of the trial court is *Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ. concurring.

NICK LUDOWESE, Appellant, v. FARMERS' MUTUAL COOPERATIVE
COMPANY.

Contracts in restraint of trade: INVALIDITY. The by-law of a co-operative company making it the duty of the company to pay its members the highest market price for farm products, but in case of sale to a competitor for a higher price such member shall pay a certain percentage of the price to the co-operative company is in restraint of competition and therefore illegal, and cannot be relied upon as the basis for affirmative relief.

Appeal from Sioux District Court.—HON. WILLIAM HUTCHINSON, Judge.

THURSDAY, FEBRUARY 19, 1914.

THE plaintiff appeals from an order overruling a demurrer to the answer.—*Reversed.*

T. E. Diamond, for appellant.

Dunn & Bryant, and *Van Oosterhout & Hospers*, for appellee.

LADD, C. J.—The Farmers' Mutual Co-operative Company is a corporation engaged in buying and selling grain, cattle, hogs, and other farm produce, with its principal place of business at Hospers. The plaintiff is a farmer living near that town and owner of four shares of the company's capital stock. It declared a dividend June 1, 1912, but refused to pay plaintiff the part to which his shares entitled him, amounting to \$45.25. So alleging, the plaintiff prayed for judgment. The answer admitted all this and alleged that article 14 of its by-laws read:

While it shall be the imperative duty of the agent of this corporation to pay each and every member of this corporation the highest price that the market will stand upon the day of sale for the grade and quality of grain and hogs offered, should any competitor in the town of Hospers offer more than the said agent can pay, then said corporation member shall be at liberty to sell to said competitor, but shall be obligated to pay to the treasury of the corporation one cent per bushel on all grain and five cents per hundredweight on all hogs and cattle as liquidating damages to the corporation. All grain, cattle and hogs sold to competitors to be weighed on corporation scales. Cattle shall be bought and sold if the board of directors shall find it convenient and advisable at all or certain times of the year.

It further alleged that plaintiff had sold 400 bushels of oats and 13,000 pounds of pork in June, 1912, to competitors of defendant in business at Hospers, and that he, as a member of the defendant corporation, became obligated to it in the sum of \$10.50 wherefore but \$34.75 was owing plaintiff. To the affirmative portion of the answer the plaintiff demurred on the grounds: (1) That the corporation was without power to adopt the by-laws; (2) that it was illegal; (3) tended to stifle competition; (4) was in restraint of trade; and (5) contrary to public policy. The demurrer was overruled, and, as plaintiff elected to stand on the ruling, judgment was entered accordingly and the cause duly certified to this court. The by-law was clearly in restraint of competition and therefore illegal. *Reeves v. Decorah Farmers' Co-Operative Society*, 160 Iowa, 194, decided since the ruling complained of.

Notwithstanding the interesting brief of counsel for appellee, we are inclined to adhere to that decision. The record does not bear counsel out in saying that plaintiff had shared the profits derived from the penalties assessed under by-law 14 or that any of these are included in the dividends in controversy. On the contrary, the answer admitted liability for the dividends declared and affirmatively pleaded the illegal by-laws and prayed to recover damages thereunder. In other

words, the only issue was that raised by the answer and that based on the by-law, and it goes without saying that a litigant may not plead or prove a void by-law, illegal contract, or other instrument as a basis for affirmative relief.—*Reversed.*

DEEMER, GAYNOR, and WITHROW, JJ., concur.

SADIE ROEH, Administratrix of the Estate of Albert Roeh,
Appellee, v. BUSINESS MEN'S PROTECTIVE ASSOCIATION
of Des Moines, Iowa, Appellant.

Accidental insurance: EVIDENCE OF ACCIDENTAL DEATH. To satisfy the
1 provision of an accidental insurance policy, that the association should not be liable for an injury or death caused by the discharge of a firearm, unless the accidental character thereof be established by the testimony of one eye witness other than the insured, it is not necessary that the witness should have seen the exact manner of the discharge of the firearm, but does comprehend the presence of the witness at or near the scene, and his direct observation of the facts and circumstances which of themselves indicate that the shooting was accidental, without the aid of any presumption arising from the instinct of self-preservation. Evidence held insufficient to establish the accidental shooting of deceased.

Same: CONTRACTS: PUBLIC POLICY. The foregoing provision in the
2 contract of insurance was not so repugnant to public policy, in that it attempts to modify or control the procedure of the courts, as to render the same invalid.

Appeal from Jackson District Court.—HON. M. F. DONEGAN,
Judge.

THURSDAY, FEBRUARY 19, 1914.

ACTION upon a benefit certificate in the defendant association. The defendant denied liability upon grounds which will be referred to in the body of the opinion. The case was tried to the court without a jury, resulting in a judgment

for plaintiff for the amount of the certificate, with interest, and defendant appeals.—*Reversed*.

Dunshee & Haines, for appellant.

Charles M. Thomas and *G. E. Hilsinger*, for appellee.

DEEMER, J.—The defendant is a mutual assessment accident association incorporated under chapters 7 and 8 of title 9 of the Code of Iowa. As such, on the 21st day of March, 1912, it received an application from one Albert Roeh for membership in the association. The application contained a statement that the insured would accept the certificate issued by the association "subject to all the conditions, provisions and limitations contained in defendant's articles and by-laws." The application was accepted, and a certificate was issued to and accepted by the insured on March 30, 1912. It provided certain indemnities in case of injury or death resulting from accident. No beneficiary is designated, but the articles provided that the indemnity should be paid to a surviving wife or heir of the member. On July 26, 1912, the insured came to his death as a result of the discharge of a rifle; whether the discharge was accidental or with suicidal intent does not clearly appear. This action was commenced by the administratrix of his estate to recover the benefits and indemnity of \$1,000, in case of death by accidental means. Defendant introduced many defenses, and the case was tried on a stipulation of facts, supplemented by certain oral testimony.

Among other things it was stipulated in the certificate of membership that:

The articles of incorporation and by-laws may be changed by amendments legally adopted, and the rights of the member to claim benefits or indemnity shall be determined by the provisions of the articles and by-laws in force at the time a claim arises. Acceptance. I hereby accept this certificate of mem-

bership subject to all the provisions, conditions and limitations of the articles of incorporation and by-laws, and agree that both myself and my beneficiary shall be bound by future amendments legally adopted; and also subject to the terms and conditions hereinbefore set out, and I agree that the articles of incorporation, by-laws, my application and this certificate shall jointly constitute the contract between myself, my beneficiary and the association.

The articles of incorporation provided that:

The association shall pay to the beneficiary designated in writing by any member of the accident department, who must be either the surviving wife or an heir of such member, the proceeds of one full assessment on each member of the accident department in good standing at the time of the accident, to an amount not exceeding the sum specified in his certificate for indemnity on account of the death of any member of the accident department occurring within ninety days from the happening of the accident and resulting directly and without intervening cause from a bodily injury sustained by the member while in good standing and effected solely by external, violent and accidental means, subject only to the conditions, provisions and limitations of the by-laws.

Article 5, Section 14. The right of any member or person claiming by, through and under any certificate issued to any member to claim weekly benefits or indemnity from the association, shall be fixed and established by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred or sickness commenced out of which any claim arises.

And the by-laws had these, among other provisions:

Article 1, Section 3. The contract between the association and its members shall consist of the articles of incorporation and by-laws and the application and the certificate of membership.

Article 4, Section 5. This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms unless the member or person claiming

by, through or under any certificate issued to such member shall establish the accidental character of such discharge by the testimony of at least one person other than the member who was an eye-witness of the event.

The only oral testimony as to the manner of death, we here quote:

Plaintiff testified:

I had some talk with my husband about noon on the day of his death over the telephone. He wanted to know what kind of meat I wanted for dinner, and said he would be down in a short time. That was somewhere between 12:30 and 1 o'clock. I heard of his death about 1:30 the same day.

Another witness said:

I saw the body of Mr. Roeh on the 26th day of July, 1912, after he was dead. I was called in there by Mr. Anderson. I found the body in the revolving chair with his head against the wall and his rifle at his left side on the floor. The ramrod was across his knees, and his legs were crossed. His right hand was hanging down, and his left hand was on his lap. The ramrod was an ordinary ramrod, about three feet long, with a crook on the end of it, and on the other end of it there was a rag for cleaning the gun. The rag was a little black from the powder from the gun. The rifle was a thirty-two magazine Winchester; the trigger being guarded by the lever which works up and down. The rifle was usually kept in the shop right at the desk where he was sitting. It was used for killing cattle; Roeh being in the butcher business. I do not remember how many days it was prior to this occurrence that they had killed cattle. I think it was two days, and that the supply of meat was low. I know Roeh had some cattle ready for killing out at a farmer's. I do not know whether he had any arrangements for killing them on that day. It was in the neighborhood of 1 o'clock when I saw the body in the chair. (Cross-examination.) Mr. Roeh was dead when I arrived. I did not hear the report of the rifle. I was called in there. (Redirect examination.) I did not know that Roeh was dead until after the doctor had been there. That was about ten minutes after I first saw him. I did not examine him to see if he was dead.

And another gave the following testimony:

I was working for Mr. Roeh in the butcher shop the day he was killed. I had a talk with Mr. Roeh about 12 o'clock on that day. He picked up the rifle and said: 'I don't believe this rifle has been cleaned out for ten years; it is so dirty.' Then he told me to get my dinner and come back to the barn and get the horses and wagon, and get back as early as possible, as we had a big afternoon's work ahead of us. I left the shop right at 12 o'clock or close to it, and it was about 1 when I got back. When I got back I stood on the sidewalk holding the team and hollered two or three times for him to come out. When he did not come, I tied the horses and went through the shop. I called as I went in, but got no answer. I glanced into the office and saw him in the chair. He was sitting in the revolving chair with his head back against the partition. I did not stop to look further, but ran out and called Mr. Goose and Mr. Peterson. (Cross-examination:) I think Mr. Roeh was dead when I first saw him. I did not hear the rifle shot. I was not present when the shooting took place. Nobody else was present that I know of or ever heard of. Our town is about 1,200 population, and I never have heard that anybody was there. Nobody ever heard the shot. Nobody saw or heard the shooting.

And the last and only other witness said:

I am the person who was called by Mr. Anderson the day on which Roeh was killed. When I got in, I found the body sitting in the revolving chair with the head leaning back against the wall, the rifle to his left side, his legs crossed, and the ramrod across his right foot. The muzzle of the gun was pointing south. He was sitting facing north. The ramrod had a rag on it, and it appeared to be a little black from running through the gun. That is all I know. (Cross-examination:) I was not present at the time of the shooting, and I did not see it. So far as I ever heard of no one heard the shot.

The defendant insisted, and still contends, that there can be no recovery under this record for the reason that there was

no eye-witness to the shooting other than the member himself. On the other hand, it is argued for appellant that there is such testimony as the policy requires, and, in any event, that the provisions of the articles and by-laws on which defendant relies are contrary to public policy, null and void, because they undertake to make a rule of evidence and interfere with the orderly procedure of courts of justice. Upon the first proposition plaintiff contends that the by-law requiring testimony of at least one person other than the member, who was an eyewitness of the event, does not necessarily mean that this other person should have been present and actually have seen the shooting; that the event includes all matters and circumstances leading up to and following the discharge, provided these be sufficient to show the nature of the discharge of the gun.

I. The event referred to in the by-law relied upon is manifestly death resulting from a bodily injury caused by the discharge of firearms, and provides that the independent testimony should come from one who was an eyewitness of that event. The objects and purposes of this rule or by-law are clear. It was to remove the presumption of accident arising from death as a result of a gunshot wound, and to require eyewitnesses of the event in order to establish liability on the part of the insurer. Not only is the beneficiary to prove the operating cause of death, as that it was from a gunshot wound; but he must prove by eyewitnesses of the event that the gun was accidentally discharged. It is not enough that he prove that it might have been so committed. His proof must be stronger than that, and fairly preponderate in favor of the proposition that the gun was accidentally discharged. The clause which we are now considering is quite different from any that have heretofore been before the courts. The nearest approach to it seems to be found in *National Acc. Society v. Ralstin*, 101 Ill. App. 192. In that case the insured was injured by the discharge of a gun, and gave testimony as to the manner of the

1. ACCIDENTAL
INSURANCE:
evidence of ac-
cidental death.

discharge. It was held that, as the plaintiff was an eyewitness of his own injury, the provision of the certificate issued by the company was complied with. *In Lewis v. Brotherhood*, 194 Mass. 1 (79 N. E. 802, 17 L. R. A. (N. S.) 714), the provision of the policy was as follows:

In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by . . . drowning or shooting, when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness, . . . then and in every such case the limit of the liability of this company hereunder shall be one-twentieth of the accidental death benefit provided for in this policy not to exceed \$250 for accidental death, and for nonfatal injuries causing total or partial disability, one-fifth of the weekly indemnity provided for in this policy.

It will be noticed that the facts and circumstances of the accident and injury were to be established by an eyewitness, and the court held that death by accidental drowning might be established by eyewitnesses of the facts and circumstances; in other words, that the accidental drowning might be established by circumstantial evidence.

In the case at bar the event, that is to say, the accidental character of the discharge of firearms resulting in death must be established by at least one person other than the insured, and "who was an eyewitness" does not necessarily mean that the witness should have seen the exact manner of the discharge; but it seems to us that it does comprehend the presence of the witness at or near the scene and his direct observation of such facts and circumstances connected with the immediate transaction, as of themselves, and without any aid from presumption or inference arising from love of life, or the instincts of self-preservation, indicate that the shooting was accidental. The following quotation from the *Lewis* case, *supra*, indicates our thought in the matter:

An eyewitness is a person who testifies to what he has seen. By the terms of this policy the facts and circumstances

of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eyewitness, but also of the accident; that is, the operating cause of the injury. Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working. To illustrate: Suppose a person standing upon the shore sees not far out a boat sailing peacefully along in a mild breeze, with a competent and careful man at the helm. The boat is so large and steady that it is not likely to be capsized by any movement that the man would make, nor by the wind as then blowing. In no sense can the boat be said to be in then present peril from any cause. Suppose the observer leaves the shore and returns in an hour, and then sees the upturned boat near where he first saw it. During his absence an accident has happened resulting in the upsetting of the boat. Can it be said that he has seen the circumstances of the accident within any fair interpretation of the language? He has seen no cause in operation to which the accident may be fairly attributed. But suppose that when he first sees the boat, or while he is looking at it, a squall suddenly looms up in the distance and rapidly approaches the boat. He sees it strike the boat, putting her in evident peril. Wanting to get a better look, he runs to a house for a spy-glass, is gone only a few minutes, and when he returns sees only a capsized boat. Such a man is an eyewitness of the accident, although he did not actually see the boat capsize. He saw the boat in peril from a then impending cause. He saw the cause at work, and saw what was the natural effect of such a cause. That is far enough; and in such a case the cause of the accident must be held to have been established by an eyewitness within the meaning of the policy.

In the instant case no one heard the shot, although it must be conceded under the record that insured died as a result of a rifle shot. Leaving out all presumptions and inferences as to the nature of the operating cause, the proof adduced would in itself be insufficient, as we think, to show (by eyewitnesses) that the gun was accidentally discharged. Not

only was the burden upon the plaintiff to show that the gun was accidentally discharged; but she had to do this by eye-witnesses of the event, and that event was, of course, the discharge of the gun.

If the by-law is good, we think plaintiff has failed to make out a case.

II. It is contended that the by-law is contrary to public policy, in that it attempts to modify and control the procedure of courts of justice. It does not in any manner deprive courts

2. **SAME: con-** of their jurisdiction, but simply provides a
tracts: public rule of evidence or a condition precedent or
policy. subsequent to a right of recovery. We see

nothing in the by-law contrary to public policy. Contracts relating to procedure have frequently been sustained. The parties may, by contract, fix their own statute of limitations. See *Harrison v. Insurance Co.*, 102 Iowa, 112. They may also specify the terms and conditions of liability, even though, without the contract, recovery might be had. *Griswold v. Railroad*, 90 Iowa, 265. A contract may be made, waiving a jury trial. *Columbia Bank v. Okely*, 4 Wheat. 235 (4 L. Ed. 559). A by-law much like the one now before us was applied in *National Ass'n v. Ralstin*, 101 Ill. App. 192; *Kelly v. Supreme Council*, 46 App. Div. 79 (61 N. Y. Supp. 394). A contract providing a rule of evidence was also upheld by this court in *Russ v. The War Eagle*, 14 Iowa, 363.

The Legislature has not spoken upon this subject, and, until it does so, we see nothing inimical to public policy in the by-law now before us.

For the reasons pointed out, the judgment must be, and it is, *Reversed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

In re Application for Support of Minor Children, OLIVE
DEBROT, Appellant, v. MARION COUNTY, Appellee.

Dependent children of widow: SUPPORT: STATUTES. A widow is one
1 whose husband is dead and who has not remarried, and not one
who has been divorced, within the meaning of the act of the 35th
General Assembly, providing that if a mother of dependent children
is a widow and is unable to properly care for them the court may
fix the amount necessary for that purpose to be paid by the county.

Same: LIABILITY OF PARENTS FOR SUPPORT OF CHILDREN. The common
2 law liability of either or both parents to support their minor chil-
dren exists, and is not affected by their divorce.

Appeal from Marion District Court.—HON. LORIN N.
HAYS, Judge.

THURSDAY, FEBRUARY 19, 1914.

APPEAL from an order of the district court denying the
application of one Olive Debrot for an order on the Board of
Supervisors of defendant county for the support of her three
minor children.—*Affirmed.*

Lorenzo D. Teter, for appellant.

No appearance for appellee.

DEEMER, J.—The case comes to us upon appeal from an
order overruling a demurrer to the answer to an application
made by Olive Debrot for allowance by the board of super-
visors of defendant county for the support of her minor
children. The facts recited in the application are substan-
tially as follows: The applicant was twice married; Lester
Adams, aged seven years, being a child by her first husband,

and Martha Debrot, aged five years, and Flora Debrot, aged two years, being children by her second husband. After her marriage to the said Debrot, and for some time prior to October, 1910, they lived in the state of Kansas, where at said time and place the said Debrot deserted petitioner and said minor children, and went to live in the state of Connecticut. Some time thereafter, the exact date of which is not disclosed, he procured a divorce from petitioner in said state of Connecticut on notice by publication only, and he has continued to live in said state until the present time. After being so deserted, the petitioner and said children came from the state of Kansas to Marion county, Iowa, where they have since continued to live. She is poor, broken in health, and unable to properly care for said minor children without financial aid, but otherwise is a suitable and proper guardian for said children, and it will best conserve their interest and welfare to be left at the home of their said mother, and under her care and custody.

The answer, to which the demurrer was addressed, was substantially as follows: "The said county alleges that the petitioner was formerly a resident of Kansas, where her second husband, Debrot, deserted her and said minors in October, 1910, and went to live in the state of Connecticut, in which state, on notice by publication only, said Debrot procured a divorce from petitioner, and that said Debrot is still living in the state of Connecticut; and therefore the said county alleges that the petitioner does not come within the purview of chapter 31, Acts 35th General Assembly, and is not entitled to an order thereunder."

The application was made under chapter 31 of the Acts of the 35th General Assembly, which amends section 254-a20 of the Code Supplement of 1907; the section after its amendment reading as follows:

Section 254-a20. Commitment. When any child of the age stated in section two (2), hereof (under the age of sixteen years) shall be found to be dependent or neglected,

within the meaning of this act, the court may make an order committing the child to the care of some suitable state institution, or to the care of some reputable citizen of good moral character, or to the care of some industrial school, as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for and obtaining homes for dependent and neglected children, which association shall have been accredited as hereinafter provided. If the court finds that the mother of such dependent or neglected child is a widow, and if the court further finds that such mother is poor and unable to properly care for said child, but is otherwise a proper guardian, and that it is for the welfare of such child to remain at home, the court may enter an order finding such fact and fixing an amount of money necessary to enable such mother to properly care for such child, and thereupon it shall be the duty of the county board of supervisors through its overseer of the poor or otherwise, to pay to such mother, at such times as said order may designate, the amount so specified for the care of such dependent or neglected child until further order of the court; providing, however, that the amount so paid for the care of any such child shall not exceed the sum of two dollars per week; and provided further that such payment shall cease upon any such child attaining the age of fourteen years. The court may, when the health or condition of the child may require it, cause the child to be placed in a public hospital or institution for treatment of special care, or in a private hospital or institution which will receive it for like purposes without charge. Any mother whose husband is an inmate of any institution under the care of the board of control, shall, for the purposes of this act, be considered a widow, but only while such husband is so confined.

Section 254-a14 of the Code Supplement defines dependent or neglected children as follows:

For the purpose of this act, the words 'dependent children' or 'neglected children' shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or who has not the proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame,

or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents or guardian or other person in whose care it may be, is an unfit place for such child; and any child under the age of ten years, who is found begging, or giving any public entertainment upon the street for pecuniary gain for self or another; or who accompanies or is used in aid of any person so doing; or who, by reason of other vicious, base or corrupting surroundings, is, in the opinion of the court, within the spirit of this act.

Sections 1, 3, 5, 15, and 17 of chapter 14, Acts 33d General Assembly, read as follows:

Section 1. Contributory Dependency Defined. When any child is found to be dependent or neglected, as defined by section 254a14 of the 1907 Supplement of the Code, the parent, parents, person or other person or persons having the care, custody, or control of such child, or any other person or persons who shall by any act or omission of duty encourage, counsel, or contribute to, the neglect of such child, or who, by reason of willful neglect of any duty owing by said parent or parents, person or persons to such child, is or are responsible for its neglect or dependency, shall be guilty of contributory dependency, and proceeded against as provided herein.

Section 3. Decree—Probation Bond. Whenever the court upon hearing finds a person guilty of contributory dependency, the court may enter a judgment determining such facts and requiring such person to do or to omit to do any act or acts complained of in the petition; and for the purpose of enforcing its judgment the court, in its discretion may continue the proceedings from time to time and release such person on probation during the period of two years. The court may further, in its discretion, as part of its judgment require such person to enter into a bond to the state of Iowa, with or without surety, in such sum as the court may direct, to comply with the orders of the court.

Section 5. Proceeding on Bond—Disposition of Sum Recovered. If the court be satisfied by information or evidence on oath, that at any time during the two years the person proceeded against has violated the terms of the court's order or the terms of said bond, the court may direct the county attor-

ney to institute proceedings on said bond in any court having jurisdiction of the sum fixed in the said bond, the sum so recovered on such bond shall be turned over to the chief probation officer to be by him safely kept and expended for the care and maintenance of such child under the direction and discretion of the court.

Section 15. In every cause in the juvenile court the court shall investigate whether every person responsible for the care, custody, maintenance, education, medical treatment and discipline of the child or children involved is doing his full duty by such child or children, and, in case the court finds that the parents, or other persons *in loco parentis* are not doing their duties the court shall try all lawful and proper means under this act to make them do so, giving them aid and assistance in case it be deemed necessary. The court may declare a child abandoned by one parent while it may not be by the other. In case the parents are divorced and the one having the custody is adjudged to have abandoned the child then the ability and propriety of the other parent shall be considered.

Section 17. This act shall be liberally construed in favor of the state for the purpose of the protection of the child from neglect, or omission of parental duty toward the child by its parents, or other persons standing *in loco parentis*, and further to protect the child from the effects of the improper conduct or acts of any person which may cause, encourage or contribute to the dependency and neglect of such child, although such person is in no way related to such child.

Section 254-a25 reads as follows:

In any case in which the court shall find a child dependent, neglected or delinquent, it may, in the same or subsequent proceedings, upon the parents of said child or either of them, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent or parents to support the child or contribute thereto, and if the court shall find such parent or parents able to support the child or contribute to its support, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution or in any way in which a court of equity may enforce its orders or decrees.

And section 254-a28 provides:

This act shall be construed liberally to the end that its purpose may be carried out, to wit: That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise.

These are the only statutes which are claimed to be relevant, and they are taken from the enactments of various sessions of the Legislature, commencing with the Thirtieth and running down to and including the Thirty-Fifth. By reason of this fact it is difficult to so read them as a whole as to make them entirely consistent and harmonious. It is manifest, however, that sections 1 and 2, Acts 35th General Assembly, must be read in connection with section 254-a20 (Acts 30th General Assembly, chapter 11, section 8) and section 254-a14 (Acts 30th General Assembly, chapter 11, section 2), as amended by sections 1, 3, 5, and 15, Acts 33d General Assembly, chapter 14, heretofore quoted. Whether or not section 17 of the last-cited amendment and section 16 of chapter 11, Acts 30th General Assembly (Code Suppl. section 254-a28) should also be considered is a matter of considerable doubt, as they are expressly made to apply to the acts in which they are found.

Reduced to its final analysis, the ultimate question presented by this record is: Is the applicant in this case a widow within the meaning of chapter 31, Acts 35th General Assembly? She is undoubtedly the mother of the children; but it affirmatively appears that her second husband, who is the father of two of the children, is still living, although he is a nonresident of the state, and it does not appear in the pleading that the first husband, the father of the other child, is dead. In other words, the pleadings do not show that applicant is a widow as that term is ordinarily used. Accord-

ing to the lexicographers, a widow is a woman who has lost her husband by death, and has not married again. See Webster's New International and the Standard Dictionaries. See, also, *Cole v. Mayne* (C. C.) 122 Fed. 836; *Whitsell v. Mills*, 6 Ind. 229. *In re Ensign's Estate*, 103 N. Y. 284 (8 N. E. 544, 57 Am. Rep. 717); *Tyler v. Ass'n*, 145 Mass. 134 (13 N. E. 360). Colloquially divorced women who have not been married again are sometimes spoken of as "grass widows," or widows bewitched. In construing wills and contracts, the word "widow" has occasionally been held to include a divorced woman; but in each and all of these cases it was due to the peculiar phraseology of the instruments. *In re Conway's Estate*, 5 Pa. Dist. Ct. 332; *Wait v. Wait*, 4 N. Y. 95; *Rittenhouse v. Hicks*, 10 Ohio Dec. 759. And a comparison of the cases just cited with those immediately preceding will demonstrate there is a lack of harmony upon the latter proposition.

Coming directly to the act in question, it will be observed that section 2 thereof undertakes to define the word "widow," or to extend its ordinary meaning, by providing, in substance, that a mother whose husband is an inmate of any of the state institutions shall, for the purposes of the act, be considered a widow so long as the husband is confined therein. The effect of this section in broadening the term is, according to all the canons of construction, to exclude all other persons who might, by interpretation or construction, be thought to be within the terms or spirit of the original act, although not within its letter. The old maxim, "*Expressio unius est exclusio alterius*," is especially applicable to statutes, and of special significance where attempt is made to specifically broaden the scope of a general term. *Müller v. Müller*, 44 Pa. 170; *Perkins v. Thornburgh*, 10 Cal. 189; *Page v. Allen*, 58 Pa. 338 (98 Am. Dec. 272).

Aside from this, however, it appears from a reading of all the statutes quoted that the common-law liability of both

husband and wife for the support of their children is recognized, and provisions are made to enforce this liability by appropriate proceedings. This liability of either or both parents to support their minor children is not, of course, affected by a divorce obtained by one from the other. It continues in spite of the divorce until the children reach their majority, or until the death of the parents. *Pretzinger v. Pretzinger*, 45 Ohio St. 452 (15 N. E. 471); *Courtright v. Courtright*, 40 Mich. 633; *Thomas v. Thomas*, 41 Wis. 229; *Brow v. Brightman*, 136 Mass. 187.

There is no allegation in the application that the father of the children is unable to support them, and the only showing with reference to Debrot is that he is living in the state of Connecticut, and there procured a decree of divorce from his wife on service by publication. This divorce did not sever the relation of parent and child, although it may have dissolved the marital relations theretofore existing. We must construe the act in question without reference to the present residence of one of the parents, for, if the mother is a widow within the meaning of the statute under which relief is sought, it is entirely immaterial where her divorced husband lives, or what his financial ability.

In interpreting the statute, we may, however, consider the effect of a holding that a divorced woman is a widow, notwithstanding the fact that her former husband and the parent of her children is a resident of the state, and amply able to provide for and support his children. In the construction of these statutes there is no middle ground. A divorced woman is either a widow or she is not, and the fact that her former husband is a nonresident of the state is of no consequence in arriving at a solution of that problem.

It is of some consequence, however, to observe that, if the divorced husband and father were a resident of this state, and possessed of ample means, the divorced wife might still rely upon the provision of the statute quoted. Of course

these laws were enacted primarily for the benefit of dependent children; but there was no thought of relieving the parents from their obligation to support their offspring. Indeed, the contrary distinctly appears.

The ruling on the demurrer was correct, and the judgment must be and it is *Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

MARY DAVITT, GUARDIAN, Appellee, v. CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant.

Railroads: CROSSING ACCIDENT: APPEAL: FINDINGS OF FACT: CON-
1 **CLUSIVENESS.** Where the only complaint of a railway company, on appeal from a judgment against it for a crossing accident, was that the record affirmatively showed contributory negligence of plaintiff, the finding of defendant's negligence in failing to give the statutory crossing signals as alleged and submitted will be accepted as a proven fact, when considering the issue of contributory negligence.

Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE. One about to cross a
2 railway track is not bound as a matter of law to look and listen for an approaching train at any given point; and whether he looked and listened at a point where he might have seen the train, and by the exercise of ordinary care avoided the accident is generally a question of fact. Evidence held to show that the driver of the team in the instant case might have discovered the approaching train before it was too late, had he been constantly on the lookout.

Same: SIGNALS: CONTRIBUTORY NEGLIGENCE: EVIDENCE. One ap-
3 proaching a railway crossing may expect the giving of statutory train signals; and if he listened but heard no signal the question of whether he exercised due care at the time was for the jury. His right, however, to expect the giving of signals will not excuse his exercise of ordinary care for his own safety at all times when approaching the crossing. In the instant case the question of whether plaintiff's ward, who was driving the team for him, was guilty of negligence was for the jury.

Appeal from Warren District Court.—HON. W. H. FAHEY,
Judge.

THURSDAY, FEBRUARY 19, 1914.

ACTION for damages resulting from negligence in operating train. From a verdict and judgment for plaintiff, the defendant appeals.—*Affirmed.*

Carr, Carr & Evans, and F. P. Henderson, for appellant.

Berry & Watson, for appellee.

WITHROW, J.—I. Action by Mary Davitt, as guardian of Phillip Davitt, for damages resulting from the striking of a team of horses and buggy by a train of the defendant. There was a trial to a jury, resulting in a verdict and judgment for the plaintiff, from which the defendant appeals. Appellant presents no error as against the finding of negligence on its part, but insists that the record affirmatively shows contributory negligence on the part of the driver of the team; and this is the only question presented by the appeal. The evidence material to that inquiry is in substance as follows: The crossing where the accident occurred was where the right of way intersects a lane leading to plaintiff's house, which is about thirty rods from the line of railway; this private lane, however, being by the appellant company treated as a highway crossing. The lane runs east and west and crosses the railroad at an angle; the crossing being known as "Davitt's crossing." From Davitt's house toward the crossing, for about half the distance the ground slopes away from the house; it is then level for some distance; and, as the crossing is approached, it rises gradually. On the north side of the lane is a row of willow trees that extends to within about fifty-three feet of the right of way fence. Between this point and the railway track there are no trees. From a point just outside the last trees at the north of the lane to the west rail of the track is one hundred and fourteen feet by actual measurement. This point is four feet eight inches below the rail,

and from this point the ground gradually rises to the crossing; fifty-seven feet from the rail being about three feet below the level of the rails and thirty feet in the neighborhood of twenty inches below. The railroad track is on a fill at the crossing, and the fill extends almost to the first cut north. The ground west of the railroad track between it and the right of way fence for a part of the distance to the first cut is lower than the track. To the mouth of the first cut north of Davitt's crossing is about three hundred feet. The length of the first cut north is five hundred feet. The bank of the cut at its highest point is about four feet above the level of the rail. Going north from Davitt's crossing the railroad rises at the rate of one foot in one hundred feet, and the track is straight north of Davitt's crossing for 1,200 feet.

Nels Sandegard, the driver of the team when the accident occurred, testified:

I worked for Davitt during October, November, and December before the accident. I was shucking corn across the railroad from the house; corn was hauled from the field to the crib, and I crossed the track at this crossing a great many times hauling corn. I had driven the plaintiff's little boy to school for about a month before the accident, and left the house about the same time every morning. The accident occurred about 8:30, and I left the house at about the time every day that this train passed over this crossing. On the morning of the accident, I knew the train had not gone by and that it would come along very shortly if it was on time. As I left the yard, I said to myself I didn't think the train had gone down yet; it must be late. I didn't know exactly when it was coming, but I was expecting it. Leaving the house and driving down the lane to the crossing, you go down a little hill, then there is a little level place, and as you approach the crossing the ground gradually rises. After you pass the willow trees there is nothing to obstruct the view looking to the north except a pile of ties and the hill through which the right of way was cut. The pile of ties was inside the right of way fence and between the fence and track, something like forty or fifty feet north of the crossing, about halfway between the track and the right of way fence, and,

if any difference, it was closer to the track than the fence; think the closest side of the ties was fourteen or fifteen feet from the track; length of the pile east and west was the length of a tie, about eight feet north, and south it was not as much as eight feet; it was about shoulder high, about fifty-seven inches. It was a clear, bright, cold winter morning. I wore a cap, but don't remember whether I had it pulled down over my ears. It was a winter cap with ear laps, made of cloth with fur on the inside, laps over the ears padded with fur. Don't remember whether the side curtains were on or not. I started from the house after the little boy had got in and drove up the lane, the horses on a trot. When about one hundred and fifty feet from the crossing, I looked to the north to see if a train was coming. When I got to a point one hundred feet from the crossing I looked both ways; that was the last time I looked until I was struck; I didn't look out again from the buggy either north or south, until I was struck at the crossing. Up to the time I was struck, the horses were on a trot, about six miles an hour. I trotted the horses along till I got to a point about one hundred and fifty feet from the crossing, and there I looked to the north; didn't stop the team. I went right on until I reached a point one hundred feet from the crossing, then I looked north again and looked south. The team kept right on trotting and went right onto the crossing, across the one hundred feet, and the team was struck. When I looked from the one hundred and fifty-foot point, I could see some of the track; I could not see anything north of the cut. The last point I looked, the one hundred-foot point, was about even with the last trees; from that point I could see up the track to the cut; that is all I saw from here. I simply looked to see whether there was any train between the crossing and the mouth of the cut, and all I could see was that there was no train between the crossing and the mouth of the cut. I looked as far north as I could see and could not see any farther north than that. I was sitting in the buggy on the seat, which was three to three and one-half feet from the ground. When I looked the last time, one hundred feet from the track, the ties were not in my way, but right up toward the track they might be some. Unless the train was directly behind these ties and at a point fifty feet from the crossing, the ties would not obstruct the view from the one hundred-foot mark. I have walked through the first

cut to the north of the crossing; I can just about see the top of the bank as I walk through. After passing out of that cut to the north, I don't know of anything to obstruct the view of the railroad track to the second cut. When I looked at the one hundred-foot point, all I could see of the railroad track was the part between the crossing and the cut. The hill where the cut rises, as you go west from the track, rises toward the right of way fence. At one hundred feet west of the railroad track, I think the lane was about six feet below the level of the rails. From the one hundred-foot mark, the lane gradually rises to the track. The railroad at Davitt's crossing is on the downgrade, and the cut is higher than the crossing. North of the cut the track still rises, and it is higher than the crossing. After looking at the one hundred-foot point, I drove on with my face to the east until I was struck.

A witness, Gilliland, called by plaintiff, testified that, on approaching the track from the one hundred and fourteen-foot point, the view to the north became wider, and when thirty-five to forty feet from the track one could see one hundred to one hundred and fifty feet into the cut. At a point fifty feet from the crossing the only obstruction is the hill, four feet two inches high, and the depression in the lane below the track. Other witnesses testified in substance to the same facts. This sufficiently presents the record for a consideration of the question raised by this appeal.

II. The particular negligence charged was that in approaching the crossing where the accident happened the engineer in charge of the train failed to blow the whistle or ring the bell. While this crossing was a private lane, in appellant's brief it is stated that the defendant company treated it as though it were a private crossing, and the evidence is without dispute that it was the practice of those in charge of the trains passing over it to give the customary crossing signals.

As no question is here raised save that of the alleged contributory negligence of the young man who was at the

time driving the team of the appellee, we must then accept as a proven fact in the case that there was a failure on the part of appellant's employees to give the usual and necessary signals in approaching the crossing, such being the grounds of negligence submitted to the jury, for upon such finding of fact must in some degree depend the question of contributory negligence.

1. RAILROADS :
crossing acci-
dent : appeal :
findings of
fact : conclu-
siveness.

It is the claim of the appellant that from the undisputed testimony it appears that, had the driver in approaching the crossing exercised ordinary care in looking and listening, he must have seen and heard the approach of the train in time to have avoided injury. While the rule as to looking and listening upon approaching a railroad track has been often stated and recognized as summing up the degree of care which should control and guide one, in the absence of other conditions excusing from such as a continuous duty, such is not without its qualifications. Many cases have arisen and have been decided by this and by the courts of other states recognizing the exceptions which at times arise, each case depending upon its particular facts.

In *Case v. Chicago, G. W. Ry. Co.*, 147 Iowa, 752, the following language was used by this court: "One about to cross a railway track is not bound, as a matter of law, to look or listen for a train at any given point. Whether or not he looked and listened at a point where he might have seen the train and avoided the injury in the use of ordinary care and prudence is generally a question for the jury."

2. SAME : con-
tributory negli-
gence : evi-
dence.

The evidence tends to show that the driver of the team which was killed did twice look to see if a train was approaching, the first time when about one hundred and fifty feet from the crossing, and the second time fifty feet nearer it. He testified that at neither time did he see or hear the train, and that, although he listened for signals, none were given. He also testified that he knew that the train was due at or

near the time, perhaps a little late, and that he was on the lookout for it. He testified that he knew of the custom to give the signals for the crossing by bell and whistle, and that as he approached he was listening for them. While the evidence tends strongly to show that, had he looked at a point within fifty feet of the track, he might have seen the approaching train in time to have avoided the accident, there also is evidence tending to show that because of the downward slope of the lane over which he was traveling, at a point fifty-seven feet from the rail, the road was about three feet below the level of the rails, and at thirty feet it was about twenty inches below; there being an upward incline to the track from a point about one hundred and fourteen feet to the west. The pile of ties to which reference has been made may not have interfered with his view so as to have been the means of leading him into danger. His own testimony is to the effect that it probably would not have done so. We think it may be fairly concluded from all the evidence that had the driver of the team been constantly on the lookout, the approaching train would have been discovered before it was too late to avoid accident. But this is not the sole test.

He had the right to expect a compliance with the custom of giving signals at that crossing, and if he listened and heard nothing there was presented a question for the jury to determine whether he was at the time exercising due care. *Harper v. Barnard*, 99 Iowa, 159; *Schulte v. C., M. & St. P. Ry.*, 114 Iowa, 94; *Willfong v. O. & St. L. Ry.*, 116 Iowa, 548; *Dusold v. C. G. W. Ry.*, 162 Iowa, 441.

The rule above stated is not intended as a means for excusing one from the exercise of ordinary care, a duty which is at all times imposed by law upon one approaching a railway crossing which is dangerous, but it is an element of fact or circumstance entering into the ultimate question whether such duty was observed. Cases arise where such reliance may not be placed upon the railroad company to meet that duty, and

3. SAME: signals:
contributory
negligence:
evidence.

some such have been cited by appellant; others, and among them those which we have cited, where, when the failure to give the signals creates a feeling of security in the traveler approaching the crossing, such should be permitted to be considered with the other facts and circumstances in reaching a conclusion of fact upon the question of contributory negligence.

Considering the facts presented in this case, the rate of speed at which the train was moving being forty or forty-five miles an hour, using no steam, with no exhaust, the claimed absence of signals, which the jury found were not given, the fact that the driver looked twice as he approached the track and discovered no danger, that he was listening for the usual signals and did not hear them, together with what the evidence shows to be the topography of the situation, which is fairly to be considered, there is presented a condition which does not permit the finding that no other conclusion than that of his own negligence could reasonably be reached.

The record is such that we must find that there was no error on the part of the trial court in submitting the case to the jury, and the judgment is *Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

MADISON COUNTY, IOWA, Appellee, v. THE CITY OF WINTERSET, Appellant.

Municipal corporations: STREET IMPROVEMENT: ASSESSMENT OF
1 COUNTY PROPERTY. Both the area rule and the front foot rule may be considered in assessing the benefits to a county from paving streets around its court house square, but neither rule is conclusive; as the ultimate question is one of benefits to all of the property adjacent to the streets improved and numerous matters enter into an equitable apportionment.

Same: INTEREST. The allowance of interest on an assessment for a public improvement after its maturity, the same as on ordinary taxes, is proper.

Appeal from Madison District Court.—HON. W. H. FAHEY,
Judge.

THURSDAY, FEBRUARY 19, 1914.

THIS is a controversy over the amount to be taxed as a paving assessment against property belonging to Madison county, used and operated as a courthouse. The county appealed to the district court from the assessment made by the city council, and the district court reduced the assessment from \$12,599.73 to \$8,908.29, and the city appealed to this court. The plaintiff also filed a cross-appeal, but the city will be called the "appellant."—*Affirmed.*

W. O. Lucas, City Atty., and J. P. Steele, for appellant.

Sam C. Smith, County Attorney, and W. S. Cooper, for appellee.

DEEMER, J.—In the year 1911 the city council of defendant city caused the streets surrounding what is known as the courthouse square in that city, which square is in the center of the business district; and a street known as North First avenue, running from the square to the railway depot, to be paved, and also a part of the streets to be curbed and guttered. Prior to the making of the improvement, the plaintiff county had constructed and maintained a gutter on the outer edge of the square on its four sides, and installed posts and hitch racks immediately outside the gutter. When the improvement in question was put in, this gutter was joined by a brick pavement, and for the first nine feet outside the hitch racks brick was laid upon a concrete base.

The paving on the south side of the square is seventy feet

in width, and on the other three sides is fifty-four feet. The four half blocks abutting on the streets surrounding the courthouse, which constitute the principal business section, are divided into forty-eight lots, each twenty-two feet in width, the average value of which, according to the finding of the trial court, was \$8,000. Around the square and on the business side of the streets are cement sidewalks twelve feet in width. As a part of the improvement, a curb was built on the business side of the streets; but none was constructed around the courthouse square. The county, however, at its own expense, filled in a space about six inches wide on its side of the street, with concrete to connect the gutter theretofore built by it, which was about four feet wide, with the paving done by the city, and the paving was so constructed as to carry the water falling thereon into the gutter constructed by the county. And it also appears that, before the pavement was laid, the courthouse block was square, but, in order to make the corners rounding in shape, the county vacated some of the ground, and also paid the expense of paving the vacated part of the old square. All the lots surrounding the square are improved with business houses of greater or less value, as is usually the case in our county seat towns. The lots vary in depth from one hundred and thirty-two feet on the north and south sides of the square to one hundred and twenty to one hundred and twenty-two on the east, and one hundred and sixteen on the west.

The cost of the curbing, paving, and guttering around the square, not counting the items already mentioned as paid by the county, was \$20,752.95, and the final assessment against the county, from which this appeal was taken, was \$8,908.29, with interest from the date of original assessment. Both parties appeal.

The testimony taken before the district court as to the proper assessment to be made, consisting largely of opinions, was, as might well be expected, conflicting and contradictory; witnesses living in the city fixing the value of the county

property and the benefits thereto very high, and those residing in the country naturally depreciating that value, and also minimizing the benefits derived from the improvement. The trial court, after hearing it all, came to the following conclusion:

The determination of the value of benefits to plaintiff's property is rendered more difficult by reason of the fact that the same has no market value, and by the terms of the dedication cannot be sold and conveyed, and, in fact, could not be converted to other uses that would be inconsistent with the terms of the dedication. However, said property is liable to special assessment for such improvements.

The assessment of benefits made by the city council has a presumption of being correct, and should not lightly be set aside by the court, but, on the other hand, presumption should not be allowed to overcome the evidence, and, where it appears that the assessment as made is not equitable or fair, it then becomes the duty of the court to make such an assessment as should have been made by the council in the first instance. This proposition is elementary, and, I presume, would be in no manner questioned, and, with this proposition in mind, coming now to consider the question of assessment made by the city council, it is difficult, if not wholly impossible, to believe that the assessment as made is equitable and in accordance with the benefits conferred. This seems to me manifest, when plaintiff's property contains only about one-half of the area of the other property abutting on this improvement, and only an equal amount of frontage on this improvement, and the assessment as made on plaintiff's property is about three-fifths of the total cost.

That one property may be assessed higher than another is no doubt true, but, when this is done, some reason therefor must exist, and, if any reason exists for the greater assessment upon plaintiff's property, it has not been shown upon the trial of this case. Special assessments for street improvements shall be in proportion to the benefits conferred, and not in excess thereof.

Both the front-foot rule and the area rule have the approval of our Supreme Court. That neither of these rules was adopted in making this assessment fully appears from the testimony of the witness Hiatt, who was the engineer in charge

of the construction of the improvement, and assisted in making this assessment.

Both plaintiff and defendant have offered the evidence of various witnesses as to the amount of benefits conferred upon both plaintiff's and defendant's property. The evidence was largely in the nature of opinion based upon different theories, and, while the court is acquainted with the most of the witnesses and has the utmost confidence in their veracity, yet the fact remains that, because the evidence being largely in the nature of their opinions in determining the question at issue, their evidence is not of sufficient weight and would hardly afford a safe guide for the court. This is more especially true of defendant's witnesses, all, or nearly all, of whom assume in their evidence that it was plaintiff's duty to provide a good and proper street surrounding their property for the benefit of all the people of the county, and likewise their duty to maintain hitch racks for the people of the county to use. This and other matters of like character were the bases of their opinions. That it is the duty of the plaintiff to aid in maintaining the streets surrounding their property right be conceded; but this does not arise because it is the county, but because they are the owners of the property. It may also be conceded that the plaintiff has the right to provide hitching racks for the use of the people, but it might not follow that, because it does do this, it is not their duty to improve the streets. It is a fact that the court might take judicial notice of that the counties, as well as the cities, states, and even the nation itself build large beautiful buildings, not alone for their use, but for their beauty, and in which the people take a just pride. That the people of this county take a pride in their courthouse and its yard is, no doubt, true, and anything that materially adds to its use and appearance should properly be considered as benefit and as adding to its value. And that the improvement in question adds to the use and enjoyment of plaintiff's property, as well as adding to its general appearance, is abundantly established in fact. In justice to the plaintiff, it ought to be said that it does not claim that it did not receive the proportionate share of the benefits assessed to them, and I think it must be fairly said that, under the circumstances, they must be sustained in this proposition. 'A property owner is entitled to have the cost of the improvement ratably and proportionately distributed over all the property in the assessment district.'

After fully considering all of the evidence offered herein, and considering the circumstances surrounding plaintiff's property and the other property in the zone of this improvement, I have reached the conclusion that a more equitable assessment may be reached by assessing the cost of the improvement by a combination of both the front-foot rule and the area rule in equal proportions; that is, one-half by each rule, and by this plan the one-half assessed according to front-foot rule would make plaintiff's share of that half \$5,188.24; and the one-half assessed according to area rule would make plaintiff's share of that half \$3,720.05; or a total of \$8,908.29. I am satisfied that under all the circumstances that this rule is as near fair and equitable as can be adopted, and that plaintiff's property is fairly benefited in this amount, and that it is its proportionate share of the cost of the improvement.

In this connection, it should be stated that, while the court below may not have adopted a proper rule for fixing the assessment, yet it is true that both the area and the front-foot rule may be considered in arriving at the proper assessment to be made; but neither is conclusive; as, after all, the question is one of benefits, and there are many matters which must be taken into account. The benefits arising out of the expense must, of course, be properly apportioned, and it would be inequitable to assume that the county received all, and the property owners none. Every business lot on this square received a benefit—some more perhaps than others—and yet either a front-foot or an area rule might have been applied to them. But, in the circumstances shown, it would, as we think, be inequitable to say, as a matter of law, that, although both in area and in front footage the county does not own half the property, yet it should be assessed with one-half or any other arbitrary sum, no matter what the value of the improvements to the business lots.

Of course the courthouse square is paved on all sides, and any one may now approach from any angle or side of the square. This is something of an advantage over private

1. MUNICIPAL
CORPORATIONS:
street improve-
ment: assess-
ment of county
property.

property which cannot be so reached, and yet, on the other hand, every piece of business property around the square may now be reached, after one gets upon the pavement, from any other part of the square. Of course, the county has a monopoly in its business, and often a man having business to transact with it must go to the courthouse. But, aside from residents of the town, who would naturally trade with local merchants, those coming from a distance are not only afforded every access to the courthouse, but also to hotels, restaurants, and other places where they may be induced to trade (without getting in the mud), and the business man also gets the benefit—not so much, of course, as the county, but in the aggregate a considerable sum.

Moreover, the property is public. It is not kept for private profit or gain, and the county actually gains nothing in dollars and cents from the pavement. Each member of the political body may have some gain in the way of private convenience, and perhaps in other ways, as the saving of shoe leather, clothing, etc. After all is said, it is perfectly manifest that these assessments must, of necessity, be only an approximation. The witnesses were before the trial court. The trial judge knew the exact situation, and, on the record as we have it, we do not feel justified in disturbing the final assessment made by him against the county on either appeal. As neither party is satisfied, we may well assume that the result is as nearly correct as we could hope to make it, were we without an opinion from the trial court. Enough was allowed because of special convenience to the county property, over and above the area and front-foot rule, as it seems to us, to fairly equalize the matter.

There was no error in the allowance of interest. Code, section 825. *Lightner v. Board of Supervisors*, 156 Iowa, 398.

2. SAME: Interest.

The judgment seems to be as nearly correct as we could hope to make it, and it is therefore *Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

J. A. ROBERTSON and MARY E. ROBERTSON, Appellees, v. U. S. LIVE STOCK Co. and J. S. SMITH and C. M. THOMPSON, Defendants, and LIVE STOCK NATIONAL BANK, Intervener and Appellant.

Mortgages: BONA FIDE PURCHASER: BURDEN OF PROOF: EVIDENCE.

1 Where a mortgage had its inception in fraud the burden is upon the holder to show that he took it in good faith, for a valuable consideration, before maturity and without notice of the fraud.

Same. Lack of knowledge on the part of a bank and of the officers of
2 the bank, that a mortgage held by it was obtained by fraud, may be established by the direct testimony of all the officers who might or could know, or by facts and circumstances from which the inference of want of knowledge must necessarily be drawn.

Same: ASSIGNMENT OF MORTGAGE: BONA FIDE HOLDER: CONSIDERATION.

3 The assignment of a note carries with it a mortgage given to secure the same, and the right to foreclose the mortgage; and a bona fide purchaser without notice takes the mortgage relieved of any infirmities in its inception; and extension of the time of payment of the mortgage is a valuable consideration.

Mortgages: ASSIGNMENT TO BANK: FRAUD: NOTICE: EVIDENCE. It

4 is not necessary under all circumstances that all the officers of a bank be called as witnesses to establish the fact that the corporation had no notice of the fraud entering into the making of a mortgage held by it as assignee. Where the managing officers of the bank and those who had charge of the particular transaction testified that they had no knowledge of the fraud and acted in good faith, knowledge of the bank through any other officers may be negatived by facts and circumstances affirmatively showing that it could not have had notice through any such source. Knowledge of the fraud is not shown in the instant case.

Appeal: TRIAL DE NOVO. An action to set aside an alleged fraudulent
5 conveyance is triable de novo on appeal, and the appellate court will examine the evidence and determine the ultimate facts.

Appeal from Dallas District Court.—HON. J. H. APPLGATE, Judge.

THURSDAY, FEBRUARY 19, 1914.

ACTION to set aside a certain conveyance of real estate, made by the plaintiff to the United States Live Stock Company, on the ground of fraud. The Live Stock National Bank intervened and claimed that, after the conveyance sought to be set aside was made and the deed executed, delivered, and recorded in pursuance of such conveyance, the United States Live Stock Company, grantees in the deed from the plaintiff, executed a mortgage on said premises to defendants Smith and Thompson to secure a note of \$1,075; that said note and mortgage were sold and transferred to the intervener bank by said Smith and Thompson, for a valuable consideration, before due; and that intervener had no notice or knowledge of any fraud, perpetrated by said Live Stock Company, in securing title to the land from the plaintiff. A decree was entered dismissing intervener's petition, and intervener appeals.—*Reversed.*

D. L. Johnson and Burton Russell, for appellant.

D. H. Miller, for appellee.

GAYNOR, J.—On March 1, 1911, plaintiff J. H. Robertson was the owner of lot 6, block 9, in the town of De Soto, Iowa, and on that day, his wife joining with him, conveyed said lot to the defendant United States Live Stock Company by warranty deed, and the deed was on the 23d day of March, 1911, duly filed for record in the office of the recorder of deeds in Dallas county, Iowa, and duly recorded. It is conceded that the conveyance was obtained from the plaintiff by the United States Live Stock Company through fraud and misrepresentation, and that the plaintiff, by reason of such fraud, was entitled to have the conveyance set aside as between him and the said defendant.

On the 12th day of July, 1911, the defendant United States Live Stock Company executed a mortgage on the land,

so received from the plaintiff, to the other defendants, J. S. Smith and C. M. Thompson, to secure the payment of a promissory note executed by said J. S. Smith and C. M. Thompson in the sum of \$1,075, at 8 per cent. interest from date until paid, and the same was filed for record and recorded in the office of recorder of deeds of said county on the 18th day of July, 1911.

The plaintiff brought this action to set aside and cancel the deed, executed by him to the United States Live Stock Company on account of the fraud practiced upon him in procuring the same, and to have the mortgage executed by United States Live Stock Company to Smith and Thompson also canceled for the same reason, alleging (and it appears to be a fact) that the United States Live Stock Company was a corporation; that defendant J. S. Smith was its president; and that Thompson was a member of defendant corporation and had full knowledge of said false representations and of the design and purpose of the United States Live Stock Company to cheat and defraud the plaintiff in said transaction. In the action so brought, the Live Stock National Bank intervened and claimed that, before the maturity of the note described in plaintiff's petition, executed by the United States Live Stock Company to C. M. Thompson and J. S. Smith, and secured by the mortgage on the land in controversy, this intervener, for a valuable consideration, purchased said note from C. M. Thompson and J. S. Smith, and the same was assigned and indorsed to it; that, at the time it purchased said note, it had no knowledge or information of the matters and things set forth by the plaintiff in his petition; and that said mortgage was duly assigned to them as an incident to said note. Wherefore intervener asks that said mortgage be foreclosed and be decreed a first lien upon said premises, and that a special execution issue for the sale of said premises, and the proceeds be applied on the payment of said note. Plaintiff files a general denial to the petition of intervener.

A decree was duly entered in favor of the plaintiff against the defendants, the United States Live Stock Company, J. S. Smith, and C. M. Thompson, and the title adjudged to be in the plaintiff, as against said defendants, and the deed, executed by the plaintiff to the United States Live Stock Company, was, as to those defendants, canceled and set aside. This decree was without prejudice to the rights of the interveners.

On September 24, 1912, after trial, the court found for the plaintiff as to the intervener, and decreed that the plaintiff is the absolute owner of lot 6, in block 9, in fee simple, as against intervener, and adjudged further that in the purchase of said note and mortgage intervener acquired no lien, right, title, or interest in said premises; that it failed to show that it acquired said note and mortgage in good faith, and without notice of the fraud practiced upon the plaintiff in securing the land, and accordingly canceling said mortgage. The intervener alone appeals.

In view of the concessions made in argument, we must assume that the United States Live Stock Company fraudulently obtained the deed to the property in controversy from the plaintiff, and that the United States Live Stock Company, in furtherance of such fraud, executed the mortgage to J. S. Smith and C. M. Thompson, and that the deed and mortgage in question, as between the plaintiff and these defendants, is fraudulent and was, by the court, rightly set aside.

This mortgage having its inception and resting in fraud, the burden rests upon the intervener to show that it took the mortgage in good faith, for a valuable consideration, before maturity, and without notice of the fraud.

1. MORTGAGES:
bona fide purchaser: burden
of proof: evidence.

See *Arnd v. Aylesworth*, 145 Iowa, 185. Did it do this? The evidence shows that the inter-

vener is a corporation, a banking corporation; that Charles F. McGrew was its president, and L. M. Lord was cashier; that it had two assistant cashiers and a vice president; that the vice president took no active part in the management of the bank and had nothing to do with the

management of the bank; that neither of the assistant cashiers had anything to do with the making of loans or approving loans; that they worked under the direction of the other officers of the bank; that no one was authorized to make any loans in the bank or to renew loans or make any change in loans, except the president and the cashier; that the agreement to take this note and mortgage was made on behalf of the bank, by Mr. McGrew, the president; and that McGrew represented the bank in the negotiations leading up to the taking of the note. McGrew testifies that the matter of loans was entirely looked after in the bank either by Lord or himself; that the work of the two assistant cashiers would be entirely outside of the negotiation and approving of loans. McGrew and Lord both testified, in behalf of the intervener, that they had no knowledge of any kind whatsoever of a claim that there had been any fraud perpetrated in the obtaining of the title, by the United States Live Stock Company, for the plaintiff. Neither of the assistant cashiers were called to testify.

The question here is not, did McGrew or Lord have notice of the fraud? but did the bank have notice? The burden was on the bank to show that it did not. It has been frequently held that denial of notice, by one who purchases an instrument, that it had its inception in fraud, even though uncontradicted by other witnesses, is not sufficient to justify the court in directing a verdict in his favor. See *McNight v. Parsons*, 136 Iowa, 390. But it has also been held that, although the uncontradicted evidence of the buyer of fraudulent paper is not sufficient to justify the direction of a verdict, yet the facts and circumstances supporting the denial of notice may be such as would warrant such a direction, but this only in case where the facts and circumstances are such that a reasonable man could not draw therefrom any other conclusion than that contended for.

The mere fact, therefore, that there are other officers of the bank who were not called to testify does not in itself

negative a conclusion that the bank did not have notice. Where the officers of the bank, who had charge of the transaction in question, and who acted for the bank in the consummation of the matter out of which the controversy arose, are called as witnesses, and testified that they had no notice or knowledge of the fraud prior to or at the time the deal was consummated, and it is apparent from all the facts and circumstances disclosed by the record that the other officers, who were not called, could not, from the nature of the transaction and the manner in which it was carried on, have notice of the matters charged as constituting fraud, the testimony will be sufficient to negative the existence of knowledge on the part of the bank.

The existence or non-existence of a disputed fact may be established by facts and circumstances, as well as by direct testimony. While a jury or a court is not bound to accept

2. SAME. the testimony of any witness as absolutely true, yet neither the court nor the jury has a right to disregard the testimony of a witness or refuse to accept a fact as established, where all the facts and circumstances corroborate the witness, and the testimony of the witness and the facts and circumstances show affirmatively the existence or the non-existence of the disputed fact.

The want of notice on the part of the intervener in this case, the want of notice on the part of every officer of the intervener, may be established by direct testimony of all the officers who might or could know; or it may be established by facts and circumstances from which the inference of want of knowledge must necessarily be drawn.

As said in *Arnd v. Aylesworth*, *supra*:

Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A cate-

gorical denial of notice or of knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place, and manner of the transaction, its conformity to or departure from the ordinary methods of business, and all other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase, . . . constitute a showing which the court cannot properly pass on as a matter of law.

In all these cases the testimony might be insufficient to establish bad faith and still not affirmatively establish good faith. The burden is on the intervener, in this case, to establish good faith. See, also, *Bennett State Bank v. Schloesser*, 101 Iowa, 571.

It appears from this record that the deed from the plaintiff to the United States Live Stock Company was executed on the 1st day of March, 1911; that the same was recorded on the 23d day of March, 1911; that the mortgage in question, executed by the United States Live Stock Company to Smith and Thompson, was made on the 12th day of July, 1911, and filed for record on the 18th day of July, 1911; that the intervener bank purchased this note and mortgage from Smith and Thompson on the 12th day of July, 1911, on the same day that it was executed, and before it was recorded. It appears that this note and mortgage was taken by intervener as collateral security for the payment of a judgment obtained by the intervener against Smith and Thompson, on which intervener was threatening to issue an execution. Smith and Thompson delivered this note and mortgage to the intervener on condition that they would not issue execution upon the judgment, with the further consideration that intervener would not enforce the collection of the judgment until the expiration of the time for which the note purchased ran. That was sixty days. There was no agreement that the judgment should be released.

Lord testifies that he had nothing to do with the negotiations which led up to the giving of the note. That was carried on by McGrew. He said:

Personally I don't know whether the note was secured, because I did not take it. I do not know that the mortgage, purporting to secure a note of that amount, given by the United States Live Stock Company to the parties to this note, was received by our bank on the 12th day of July, 1911. I do not recall from whom I received the mortgage. I sent it for record. I knew about the United States Live Stock Company. That its headquarters were at Omaha. That it was a corporation. Mr. Smith told me he was one of the members. Mr. Thompson also told me he was a member. I heard of this company as early as 1909. Learned of it in conversation with Thompson. This was about six months after we made the loan upon which we obtained judgment. I heard that the United States Live Stock Company had taken over the business and debts of Smith and Thompson, but we had no business with the United States Live Stock Company until we acquired the note and mortgage in controversy. Before we acquired the note in suit, we had heard nothing of the United States Live Stock Company's being in trouble with different people in the trading of horses on the range. I did hear of their having trouble with the City National Bank in Omaha, and that they were sued.

It appears that the note and mortgage in question had not been executed at the time that McGrew talked with Smith and Thompson. One D. L. Johnson, called for intervener, testified as follows:

I am an attorney at law, living at Omaha, Neb., and am acquainted with the Live Stock National Bank of South Omaha and with the United States Live Stock Company and Mr. Smith and Mr. Thompson of that company. On or about July 12, 1911, I had a transaction with J. S. Smith and C. M. Thompson and the United States Live Stock Company in behalf of the Live Stock National Bank. This was in reference to the securing of an indebtedness of Mr. Smith and Mr. Thompson to the Live Stock National Bank

of South Omaha. Exhibit 1 is a promissory note dated July 12, 1911, on 60 days' time, in favor of J. S. Smith and C. M. Thompson, for \$1,075, with 8 per cent. interest from date, executed by the United States Live Stock Company by J. S. Smith, president, attested by E. O. Ames, secretary, with the indorsement of payment guaranteed and protest waived, C. M. Thompson and J. S. Smith. That is the note in suit, and the body is in my own handwriting. I did not see the parties sign it. Exhibit 2 is a real estate mortgage given by the United States Live Stock Company securing the \$1,075 note to which I have referred, and which is marked Exhibit 1, and it is on property in this county. The note and mortgage just referred to were taken at the time of the transaction mentioned in my testimony. None of the officers of the Live Stock National Bank of South Omaha were present. I had no knowledge in the least at the time of any fraud, if there was any fraud, in acquiring of the title by the persons giving the mortgage. The note and mortgage were taken in the name of J. S. Smith and C. M. Thompson, and by them indorsed, instead of in the name of the bank, for the reason that the original indebtedness was that of Mr. Smith and Mr. Thompson, and I did not care to release them, and I made the note payable to them, and then asked them to indorse it and waive protest so that they would be held individually. The note and mortgage were taken for the payment of an indebtedness evidenced by a judgment in the district court of Douglas county, Neb. Mr. Smith and Mr. Thompson, I am not certain which, said to me that they would give this security if we would give them an extension of 30 days on the indebtedness and reduce the interest from 10 per cent., the amount the judgment bore, to 8 per cent. Before taking this note and mortgage, I satisfied myself in some way, whether it was by my own correspondence or that of others I do not know, that the title to these lots stood in the name of the United States Live Stock Company and were clear of incumbrance. I believe there was an abstract, but of that I am not certain. Mr. Smith or Mr. Thompson has paid \$541.45 on this claim since suit was brought. \$541.45, less \$54.15 collection fee and \$31.96, being the total of \$86.11. The \$31.96 being expenses of my own in this case. The date of the payment was May 7, 1912, and the net amount \$455.54.

This was practically all the testimony that was submitted on this branch of the case.

The assignment of the note carried with it the mortgage and the right to foreclose upon the mortgage.

3. SAME: assignment of mortgages: bona fide holder: consideration.

See *Preston, Kean & Co. v. Morris Case & Co.*, 42 Iowa, 549.

One who receives a mortgage, in good faith, for a valuable consideration, without notice of any infirmities in its inception, takes it relieved of such infirmities. See *Farmers' National Bank of Salem v. Fletcher*, 44 Iowa, 252; *Updegraff v. Edwards*, 45 Iowa, 513; *Vandercook v. Baker*, 48 Iowa, 199.

The giving of further time for the payment of an existing debt is a valuable consideration. See *Koon v. Tramel*, 71 Iowa, 132.

As stated before, the only question here is: Did the bank, the intervener, have notice of the fraud involved in the transaction between the plaintiff and the United States Live Stock Company, by means of which plaintiff was induced to convey the land to the United States Live Stock Company? The burden of proof is on the intervener to show that it did not have notice or knowledge. The president and the cashier, who were the managing officers of the bank, and who had control of the bank's business and the making and extending of loans, testified that they had no knowledge. This has been held not sufficient, in and of itself, in all cases, to justify a finding that the bank did not have notice. It is said that other officers of the bank may have had notice, and that this would charge the bank with notice. It has never been held that it is absolutely essential to call every officer and agent of a bank into court and have him testify directly that he had no notice of the fraud, in order to carry the burden to a successful issue on the part of the bank. The testimony of the managing officers and those who had charge of and managed the particular business for the bank, and

4. MORTGAGES: assignment to bank: fraud: notice: evidence.

who acted for the bank in the particular transaction, having been called and having testified that they had no knowledge but acted in good faith in the transaction, the knowledge of the bank, through any other officer, may be negatived by facts and circumstances which affirmatively show that the bank could not have had knowledge through any such source. Concerns of this kind, transacting large business and having many officers and agents in the transaction of business, through whom notice might be conveyed, suggests the necessity of negating knowledge conveyed through any of these channels, and this is best done by calling the parties to testify, by and through whom such knowledge might be communicated.

But it would be a serious burden and handicap to the legitimate transaction of business of this kind to require, in every transaction, that the bank purge itself by calling, as witnesses in its behalf, every officer or agent through whom notice might possibly be communicated to the bank, or whose knowledge or notice would bind the bank. It would be sometimes impossible to do this, and the law does not require it. It is sufficient that the officers, through whom the business was transacted, are shown not to possess notice or knowledge of the fraud, with proof that negatives, to a legal certainty (that is, to as much certainty as can be secured in the administration of the law), that the other officers and agents could not, in the nature of things, and therefore did not, have notice or knowledge such as would charge the bank with notice of the fraud.

This case is triable *de novo* in this court. It is our duty to examine the testimony presented and determine the ultimate fact therefrom. With all due respect to the learned judge who tried the case below, we are forced to a different conclusion than that reached by him on the record made, and we find that no other conclusion can be fairly reached from this record other than that the intervener did not have notice or knowledge of the

5. **APPEAL:** trial
de novo.

fraud charged at the time it purchased the note in question. This conclusion seems inevitable from the whole record, unless it should be held necessary that the intervener should call all the other officers and agents of the bank and have them testify that they had no knowledge, in order to carry the intervener's claim to a successful issue. This we cannot hold. See *Des Moines Savings Bank v. Arthur*, 163 Iowa, 205.

The case is therefore reversed and remanded, with instructions to enter a decree in favor of the intervener in accordance with this opinion.—*Reversed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

MRS. ELIZABETH BIGGS, Appellee, v. J. J. SEUFFERLEIN,
Appellant.

Assault: USE OF FORCE IN THE DEFENSE OF PROPERTY: INSTRUCTIONS.

Where another is rightfully in possession of personal property the owner is not justified in committing an assault for the purpose of regaining possession of the same; but having a right of possession and to enter the premises of the other for the purpose of removal he may defend his possession thus acquired by consent with the exercise of reasonable force: and where the evidence tends to support the contention that possession was acquired by consent of the other party the jury should be instructed as to the right to exercise force in defense thereof.

Appeal from O'Brien District Court.—HON. JOHN F.
OLIVER, Judge.

MONDAY, FEBRUARY 23, 1914.

ACTION to recover damages for assault and battery. Verdict and judgment for the plaintiff. Defendant appeals.—*Reversed*.

Sidney C. Kerberg and T. E. Diamond, for appellant.

C. A. Babcock, for appellee.

GAYNOR, J.—The facts upon which plaintiff predicates her right to recover, as stated in her petition, are that on or about the 25th day of January, 1911, this defendant went to her house in Sanborn, Iowa, and then and there willfully and maliciously committed an assault and battery upon her by taking and grabbing hold of her wrists and arms, and jerking and pulling her about the house, whereby she sustained personal injuries which she estimates at \$2,000. The defendant pleaded a general denial. There was a trial to a jury and a verdict rendered for the plaintiff. Judgment being entered upon the verdict, the defendant appeals.

There was evidence tending to show the following facts:

That during the month of August, 1910, the firm of Kerberg & McFarland, a copartnership, were engaged in the retail hardware business in the town of Sanborn. Plaintiff was engaged in the business of conducting a boarding house in the same town. On the 29th day of August, 1910, the plaintiff hired from Kerberg & McFarland a Majestic range, and took possession of the same under the following contract:

This agreement witnesseth: That I have hired from Kerberg & McFarland, of Sanborn, the following described articles of Majestic range, upon the terms named herein, to wit: One Majestic range, No. 8142. In consideration of said hiring of said range, I agree to pay said Kerberg & McFarland at their store in said Sanborn, Iowa, the following named sums at the dates stated: \$15.00 on September 25, 1910. \$15.00 on October 25, 1910. \$15.00 on November 25, 1910. \$15.00 on December 25, 1910. \$ Bal. on January 25, 1911. \$ Bal. on 1911. \$ Bal. on 1911. \$ Bal. on 1911. Together with interest at the rate of 8 per cent. per annum from date hereof until all said sums are fully paid. Upon failure to pay any of said sums, the payments that have been made shall be forfeited to said Kerberg & McFarland, and all the said range shall be by me restored to them, and I agree that they may without process of law take possession of said range and for that purpose they may enter any of my premises and remove the same therefrom, and I hereby waive any trespass or right of action against them for

damages by reason of any such entry and removal. I further agree that in case of default on my part in carrying out any of the several agreements herein named, I will pay any balance that may remain of the sums above mentioned after the goods once returned to said Kerberg & McFarland have been sold. That such sale may be private or at public auction, and if the proceeds shall amount to more than the balance due said Kerberg & McFarland and costs, then such surplus shall be turned over to me. I will also pay all reasonable costs and expenses and attorneys' fees that the said Kerberg & McFarland may be put to, to recover the said range and enforce this lease; that I will not in any manner dispose of any of the said articles of range nor will I remove them or any part thereof, from the place they are to be kept as is hereinafter designated, without the written consent of said Kerberg & McFarland until I have acquired title to the same as hereinafter provided; that title to same shall remain in said Kerberg & McFarland until the sums herein specified are fully paid, that the said range shall be used by me only at my residence in Sanborn, Iowa, and that I will keep the same in as good repair as when I get them, except the wear and tear that may result from reasonably careful use. But upon payment of all the sums therein specified, then, upon making the last payment, the said Kerberg & McFarland are to convey said range to me by bill of sale or by surrender to me of this lease.

Prior to the happening of the matters complained of, and on the dates herein stated, the plaintiff paid, upon said range, the following sums: September 28th, cash, \$10. October 21st, \$4. November 4th, \$8. December 9th, \$10.

That the plaintiff failed to make the payments as required in said contract. That there was due and unpaid on said contract, on the 25th of January, 1911, \$38. That prior to said date, the said firm had repeatedly requested plaintiff to make payments as required under the terms of the written contract, and, though she frequently promised to do so, made no other payments than as above set forth. That just before the happening of the matters complained of, the said firm had learned that plaintiff had broken up her boarding house, and intended to leave Sanborn, and that she was largely in-

so received from the plaintiff, to the other defendants, J. S. Smith and C. M. Thompson, to secure the payment of a promissory note executed by said J. S. Smith and C. M. Thompson in the sum of \$1,075, at 8 per cent. interest from date until paid, and the same was filed for record and recorded in the office of recorder of deeds of said county on the 18th day of July, 1911.

The plaintiff brought this action to set aside and cancel the deed, executed by him to the United States Live Stock Company on account of the fraud practiced upon him in procuring the same, and to have the mortgage executed by United States Live Stock Company to Smith and Thompson also canceled for the same reason, alleging (and it appears to be a fact) that the United States Live Stock Company was a corporation; that defendant J. S. Smith was its president; and that Thompson was a member of defendant corporation and had full knowledge of said false representations and of the design and purpose of the United States Live Stock Company to cheat and defraud the plaintiff in said transaction. In the action so brought, the Live Stock National Bank intervened and claimed that, before the maturity of the note described in plaintiff's petition, executed by the United States Live Stock Company to C. M. Thompson and J. S. Smith, and secured by the mortgage on the land in controversy, this intervener, for a valuable consideration, purchased said note from C. M. Thompson and J. S. Smith, and the same was assigned and indorsed to it; that, at the time it purchased said note, it had no knowledge or information of the matters and things set forth by the plaintiff in his petition; and that said mortgage was duly assigned to them as an incident to said note. Wherefore intervener asks that said mortgage be foreclosed and be decreed a first lien upon said premises, and that a special execution issue for the sale of said premises, and the proceeds be applied on the payment of said note. Plaintiff files a general denial to the petition of intervener.

A decree was duly entered in favor of the plaintiff against the defendants, the United States Live Stock Company, J. S. Smith, and C. M. Thompson, and the title adjudged to be in the plaintiff, as against said defendants, and the deed, executed by the plaintiff to the United States Live Stock Company, was, as to those defendants, canceled and set aside. This decree was without prejudice to the rights of the interveners.

On September 24, 1912, after trial, the court found for the plaintiff as to the intervener, and decreed that the plaintiff is the absolute owner of lot 6, in block 9, in fee simple, as against intervener, and adjudged further that in the purchase of said note and mortgage intervener acquired no lien, right, title, or interest in said premises; that it failed to show that it acquired said note and mortgage in good faith, and without notice of the fraud practiced upon the plaintiff in securing the land, and accordingly canceling said mortgage. The intervener alone appeals.

In view of the concessions made in argument, we must assume that the United States Live Stock Company fraudulently obtained the deed to the property in controversy from the plaintiff, and that the United States Live Stock Company, in furtherance of such fraud, executed the mortgage to J. S. Smith and C. M. Thompson, and that the deed and mortgage in question, as between the plaintiff and these defendants, is fraudulent and was, by the court, rightly set aside.

This mortgage having its inception and resting in fraud, the burden rests upon the intervener to show that it took the mortgage in good faith, for a valuable consideration, before maturity, and without notice of the fraud.

1. MORTGAGES:
bona fide purchaser: burden
of proof: evidence.

See *Arnd v. Aylesworth*, 145 Iowa, 185. Did it do this? The evidence shows that the inter-

vener is a corporation, a banking corporation; that Charles F. McGrew was its president, and L. M. Lord was cashier; that it had two assistant cashiers and a vice president; that the vice president took no active part in the management of the bank and had nothing to do with the

and struck him with it, and said: 'If I cannot get you out one way, I will get you out another. If I had a gun, I would blow your head off.' I started to go to the telephone. Defendant followed me. He took me by the arms and pulled me the length of the sitting room and then let me go. Called me a damn bitch. When he got to the door, he threw his elbow back and struck me. Finally, I got back to the telephone, and defendant went and helped McFarland and the hired man to take the range out. When he pulled me off the stove, I lit on my feet and stayed on my feet. When I got down, I was so mad I don't know whether I was weak when he pulled me off the first time. Nor the second time. Nor the third time. I forbade them at the very start to take the stove after they got in the kitchen, unless they had papers for that purpose. They had not carried out any portion of the stove at the time I jumped up onto it, and had not moved the stove at all. They took the stove pipe off while I sat upon it."

This is sufficient testimony to show the theory of the plaintiff and the defendant as to what transpired at the time it is claimed that the plaintiff was injured.

Upon this state of the record, the defendant asked the court to submit to the jury the following instructions:

Paragraph 1. If you find from the testimony that the plaintiff gave her consent that the defendant and the witness G. W. McFarland enter the house, and she thereafter told them they might remove the stove, and you further find that they did in good faith move said stove from its position in the room, take down the pipe, and carry certain portions of the stove out of the house and into the street with her full knowledge and consent, then, in such case, the defendant and said McFarland had the right to remove said stove from the house where plaintiff was living and to take the same away, even though you further find that the plaintiff objected to their removing the main part of the stove after part had been conveyed into the street. But you are further instructed that the defendant had no right to use any other or greater force in removing said stove than was necessary, acting as a reasonable and prudent man, to remove the same. Nor was the

defendant justified in using such force, as against the plaintiff, as to cause her any serious injury; but if she obstructed his work in removing said stove, after having consented to its removal as hereinbefore stated, then the defendant had the right to use such force as was necessary to remove said stove, as long as he committed no injury to the plaintiff.

Paragraph 2. You are further instructed that, according to the terms of the contract of purchase, the witness McFarland, or any one acting for him and under his direction, upon default in payment according to the terms of contract, had the right to take possession of said stove wherever the same might be found, in a peaceable manner, and if you find from the testimony that the plaintiff surrendered said stove into the possession of said McFarland and this defendant, and they took possession thereof with the full knowledge and approval of the plaintiff, then and in that case they had a right to retain possession thereof and to remove the same, if they could and did so remove it without personal injury to the plaintiff.

Paragraph 3. You are further instructed that if the plaintiff gave her full consent that said stove be removed, and surrendered the same willingly into the possession of said defendant, and said McFarland, then and in such case, they were not required to stop or desist in removing the stove simply because plaintiff told them she had changed her mind or told them that they could not remove the same, if you find from the testimony that she did so tell them.

The court gave no instructions embodying the thought therein expressed, but told the jury that, by the terms and conditions of the contract (hereinbefore set out), the firm of Kerberg & McFarland, by reason of the defaults made by the plaintiff in the payment of the sum therein agreed to be paid, was entitled, as a matter of law, to the possession of the stove in question, and that they would have a right, at that time, to recover the possession thereof in a proper action instituted by them for that purpose, upon refusal of plaintiff to surrender the possession of the same peaceably and without suit. But they had no right, under the law, to enter the plaintiff's home, without legal process, and take the same forcibly from

her possession, without her consent and against her objections and protest; if they did so do, and if they entered for that purpose and attempted to take the same without legal process and over her objections and protest, she had a right, under the law, to defend her possession against their unlawful acts, and to require them to leave her home, and use all proper and reasonable means to expel them therefrom, if they refused to go. And if, after the defendant and the said McFarland entered plaintiff's home, she at first consented to their taking the stove, and shortly afterwards revoked such consent and forbade them to take the same without legal process, before they had removed it from the room where it was standing, then they had no right to continue to remove the same forcibly and against her will, except under legal process. And if she then sat upon the stove to prevent them from taking and removing the same, and the defendant thereupon assaulted and rudely seized her by the arms and wrists, and forcibly removed her from her position, then such assault was an unlawful one, and the defendant will be responsible for any injuries resulting therefrom. In other words you are instructed, as a matter of law, that the seller or lessor of personal property, under a contract like the one in question, has no right, on account of default in the payments provided in contract, to forcibly take the property from the possession of the purchaser or lessee, over his objections and against his will, without first procuring a legal process or writ for that purpose; and that if, in attempting so to do, he unlawfully assaults and inflicts any injury, however slight, upon the person of the purchaser or lessee, he will be responsible in damages on account thereof. He may only recover possession of the property, without the aid of legal writ or process, when he is able to do so peaceably and with the consent or approval of the party in possession, and in so doing he has no right to assail or use any physical violence, however slight, upon the person of the party from whom he seeks to recover possession,

and, if he does do so, he is responsible for the injury or indignity suffered by the party assailed as a result thereof.

The instructions given by the court ignore the thought contained in the instructions asked to the effect that if McFarland and the defendant entered the house, as they had a right to do under the written contract, without objection from the plaintiff, for the purpose of removing the stove, and she thereupon told them they might remove the stove, and they, in good faith, moved the stove from its position in the room, took down the pipe, and carried out portions of the stove, from the house into the street, and they did this after she had surrendered the stove into their possession, she could not then revoke the license given and recapture the stove by force, and, if she then attempted to revoke the license and recapture the stove by force, they had a right to resist her in her efforts and maintain their possession, and, in so doing, had a right to use such force as was reasonably necessary to do so. Or, in other words, that if the plaintiff consented that the defendant and McFarland might take possession of the stove, after they had entered her home for that purpose, and consented that they might remove the stove from her house, and they did take possession of the stove and were in the act of removing it, though they had not removed it all from the house at the time, she could not then withdraw her consent and forcibly recover from McFarland and the defendant the possession thus given them, and, if she attempted to do so, they had a right to defend their possession by the use of such force as was reasonably necessary to maintain the same, and to remove the stove from her house.

It is apparent from this record that McFarland and the defendant, acting for McFarland, had a right to enter plaintiff's home, and did enter it, under the license given them in the written contract. It is apparent that they had a right to the possession of the stove under the written contract. It follows that, the right to enter having been given, the right of possession having been given, the right to take possession

having been given under the written contract, if possession had been actually taken by McFarland and the defendant, with the consent of the plaintiff, they were in a position to defend that possession by the use of such force, but only such force as was reasonably necessary to maintain it.

It will be noticed that the defendant's testimony tends to show that they did not use any personal violence towards the plaintiff, but simply removed her from the position she had assumed upon stove.

Each party to a suit is entitled to have his theory of the case submitted to the jury, under proper instructions, whenever there is evidence before the jury which justifies its submission.

The court, in its instructions to the jury, recognized the fact, and so stated the fact to be, that McFarland, as a matter of law, was, at the time he attempted to take the stove, entitled to its possession, and had a right to recover its possession, but said they had no right, under the law, to enter plaintiff's home without legal process, and forcibly take the same from her possession without her consent and against her objections; that if they entered for the purpose of taking or attempting to take, without legal process, over her objections, she had a right, under the law, to defend her possession against their unlawful acts, and to use all proper means to expel them from the house if they refused to leave; that even if she did consent, at first, to their taking the stove and afterwards revoked such consent and forbade them to take it without legal process, before they had actually removed it from the room, they had no right to remove it against her will, except upon legal process. Nowhere did the court say to the jury that the defendants had the right to enter the premises for the purpose of removing the stove; that having entered for that purpose, if she consented that they might take possession of and remove it, and they did thereupon actually take possession for that purpose, she would have no right to revoke her consent and seek to recover possession by force, and that, if she

did so attempt, the defendants had a right to meet force with force, provided they used no more force than was reasonably necessary to maintain such possession.

It is well settled that the mere right to the possession of property does not entitle the party to take the same from the one in the actual rightful possession by force or violence. But to recover possession, under such circumstances, resort must be had to legal proceedings. But where one has the actual right to the possession and obtains possession of the property to which he had the right of possession, from the one actually in possession with his consent, he may thereafter maintain his possession by the use of force. See *Yale v. Seely*, 15 Vt. 221.

If one attempts to take or takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession when he can stop it, and he is not guilty of assault, in thus defending his right, by using force sufficient to prevent the property from being carried away. The converse of this proposition is true: If one has intrusted his property to another who afterwards, honestly, though erroneously, claims it as his own, or claims the right to the possession, the real owner has no right to retake it by force or violence. The law will not permit or tolerate that persons take the settlement of conflicting claims into their own hands. The law gives the right to defend possession of property, but not the right to redress for the wrongful taking. The general rule is that a right of property merely, joined with right of possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld. *Barnes v. Martin*, 15 Wis. 240 (82 Am. Dec. 670); *Bliss v. Johnson*, 73 N. Y. 529.

It has been further held that if the property was rightfully in the possession of another than the owner at first, and

such possession had been surrendered to the owner, the owner had the right to maintain that possession, after it was so acquired, against every one else. See *Johnson v. Perry*, 54 Vt. 459.

The court, in the instant case, recognized the right of the party in possession to maintain his possession, by the use of such force as was reasonably necessary to do so, and applied the rule to the plaintiff in this case and her possession, but neglected to inform the jury that, if she had surrendered her possession to the defendant, the defendant had the same right, after obtaining possession, to defend his possession by the use of such force as was reasonably necessary to maintain it.

In this we think the court was in error, and, for the errors pointed out, the case is *Reversed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

GEORGE E. TAYLOR, Appellant, v. C. W. WILDMAN, Appellee.

Evidence: CROSS-EXAMINATION OF WITNESSES. The scope of the cross-
1 examination of a witness is largely a matter of discretion, and the court's ruling will not be disturbed on appeal, in the absence of prejudice. Thus overruling the objection to the mere inquiry as to whether the witness ever heard anything said on a certain subject, objected to as improper cross-examination, was without prejudice; and when a question objected to on that ground was not answered, though the objection was overruled, and on other grounds the party moved to strike the answer elicited by the court, no error appeared. In the instant case the direct examination was broad, and no abuse of discretion in the cross-examination is shown.

Instructions: ASSUMPTION OF FACTS. In an action upon a contract
2 for the recovery of a broker's commission, in which evidence was admitted tending to establish a contract different from that alleged in the petition, an instruction that there was no issue as to any other contract and it was wholly immaterial as to what other contract was made, except as it may be material in determining whether the contract relied upon was made, was not objectionable as assuming the making of a contract other than the one pleaded and relied upon.

Appeal from Jasper District Court.—HON. JOHN F.
TALBOTT, Judge.

MONDAY, FEBRUARY 23, 1914.

ACTION to recover one-half the commission earned by plaintiff and defendant as real estate brokers. The defendant filed a general denial, and on issues tendered the case was tried to a jury, resulting in a verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

Bray, Shifflett & Lake, for appellant.

McElroy & Cross, for appellee.

DEEMER, J.—But two points are relied upon for a reversal; one the cross-examination of a witness for plaintiff, and the other an instruction given by the trial court. Plaintiff is a farmer living near Lynnvile, in Jasper county, and defendant is a newspaper editor, residing at the same place. Before the transactions in controversy arose, each was doing some real estate business. Together they went with what is known as the Porter Land Company to Canada, and it is claimed that while there an officer of the land company suggested they would make a good team to sell Canada land, and that it was then agreed that they would go into the business together, share the profits from sales which either might make for the company, their commission to be \$1 per acre for all land sold.

According to plaintiff's version, they together traveled about their home county, trying to find buyers, but without success, and that the plaintiff finally purchased six hundred and forty acres of Canada land from the land company; that defendant collected the commission for the sale, \$640, and refused to share it with the plaintiff. Plaintiff also testified that defendant admitted having received and spent the money,

and that he conditionally agreed to pay the plaintiff his share thereof. Defendant denied the agreement to divide the commission, and claimed that he alone had the contract with the land company; that he, in fact, negotiated the sale to plaintiff, and was entitled to the whole of the commission from the land company. He admitted that he was to give plaintiff 50 cents an acre for every acre of land sold by him (plaintiff) or upon any purchases which he might influence others to make, but specifically denied that this agreement covered any land which plaintiff might himself buy.

I. In support of his claim, plaintiff produced a witness who testified in chief as follows:

I know the plaintiff and defendant in this case, and was acquainted with them in the year 1909. Mr. Wildman and Mr. Taylor were engaged in the real estate business in the fall of 1910. I saw Mr. Taylor and Mr. Wildman together during the fall of 1909, 1910, and 1911. I saw them driving out into the country together. They would be riding in a buggy with a couple of black ponies. I had seen Mr. Taylor driving them before. I saw Mr. Taylor and Mr. Wildman driving together north, south, and sometimes east of Lynnville. I have seen them going in different directions. I noticed them together that way more after the month of September, 1909. After September, 1909, I saw them together in the manner I have described some weeks once, some weeks twice, and sometimes oftener. They were competitors of mine, and, of course, they kept their business away from me. I do know that they were soliciting men to go to Canada to buy land, during and after September, 1909.

1. EVIDENCE:
cross-examina-
tion of wit-
nesses.

The following record was then made upon cross-examination:

I first saw these men together in Lynnville the latter part of September. The first time I saw them they were standing on the street and Charlie was talking Canada land to Taylor. Q. Did you hear him say anything concerning Mr. Taylor going to Canada to look at land? (Objected to as not proper

cross-examination, incompetent, irrelevant, and immaterial. Overruled, and plaintiff excepts.) A. Yes. Q. What did Mr. Wildman say to Mr. Taylor about their going up to buy land in that conversation? (Objected to as not proper cross-examination, irrelevant, incompetent, and immaterial. Overruled, and plaintiff excepts.) By the Court: State anything he said about Taylor's buying land. (Plaintiff excepts.) A. Mr. Wildman, as I told you, was talking about Canada. Mr. Wildman had called a man there and said that there would be a man in town in a few days to talk the matter over. There was also another party there that I was watching that they were talking to. I was kind of interested in the other party. (Plaintiff moves to strike out the answer as incompetent, irrelevant, and immaterial. Overruled, and plaintiff excepts.) Q. What were the words Mr. Wildman used in speaking of the subject to Mr. Taylor? A. Mr. Wildman said he was interested in Canada land and was talking to Taylor about it. What he said I don't remember exactly. (Plaintiff moves to strike out the answer as incompetent, irrelevant, and immaterial. Overruled, and plaintiff excepts.) They were talking something about tickets and arrangements to go, and in a general way Taylor said he would go. There was nothing said about Taylor buying land. (Plaintiff now moves the court to strike out all the testimony of the witness as to conversation between the parties as incompetent; irrelevant, and immaterial. Overruled, and plaintiff excepts.)

On redirect examination, the witness testified: "I cannot remember definitely any conversation that I heard between the two men at the time referred to."

But two of these questions were objected to as not cross-examination, and one of them simply asked the witness as to whether he heard anything said about a certain subject. The objection was properly overruled as to that question. The other question which was objected to as not cross-examination was not really answered, although the objection was overruled. In fact the court put the question which was answered, and plaintiff's motion to strike was not upon the ground that it was improper cross-examination. So much for the record, which we think does not sustain plaintiff's contention of error.

Aside from this, a large discretion is vested in the trial court as to the extent to which cross-examination may be carried, and there was no abuse of that discretion here. The witnesses' answers in chief were quite broad, and opened up rather a large field.

II. The instruction of which complaint is made, reads as follows:

You are instructed that plaintiff's cause of action is founded upon a contract set out and alleged in his petition, and that he cannot recover unless he has satisfied you that the contract relied upon was, in fact, made substantially as alleged. Evidence of defendant has been introduced and allowed by the court, tending to show that some other contract was made between plaintiff and defendant relative to the sale of Canada land, and this evidence, as well as the evidence of the plaintiff, and all other evidence in the case bearing upon the question, may be considered by you, in determining whether or not the contract set out and relied upon by plaintiff was in fact made. There is no issue as to any other contract, and it is wholly immaterial *as to what other contract was made*, except as it may be of assistance to you in determining whether or not the contract set out and relied upon by plaintiff was made.

The criticism made of it is that, by the use of the words italicized, the court assumed the making of another contract between the parties than the one pleaded and relied upon by the plaintiff. We do not so read the instruc-

2. INSTRUCTIONS:
assumption of
facts.

tion. Taken as a whole, it assumes nothing, but, in effect, says that, no matter what contract the parties may have made, it was wholly immaterial, unless it was of some assistance in determining whether or not the one claimed by plaintiff was made. In an earlier part of the instruction, the jury's attention was properly directed to the testimony offered upon a given point, and left to determine from this and all the other testimony, as to whether or not the contract claimed by plaintiff was in fact made. We see no error here of which the plaintiff may justly complain.

Finding no prejudicial error in the record, the judgment must be, and it is, *Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

W. S. BALES and J. L. BALES, Contestants, Appellants, v.
SARAH E. BALES, JAMES G. BALES and W. J. MURRAY,
Proponents, Appellees.

Wills: TESTAMENTARY CAPACITY. One who possesses a mind capable of
1 exercising judgment, reason and deliberation, and of weighing the
consequences of his act to a reasonable degree, and the effect of his
act upon his estate and family, is competent to make a will; it is
not necessary that he should have sufficient capacity to do business
generally or to engage in difficult and intricate matters.

Same: EVIDENCE. In determining testamentary capacity it is proper
2 to inquire into the relationship of the parties, and ascertain whether
the testator has been indifferent or forgetful of those who are
fairly entitled to the recognition of a reasonable and rational mind,
in making a disposition of his property. The evidence in this case
shows a recognition by the testator of those claims upon his bounty
which a man of ordinary intelligence and judgment would naturally
recognize.

Same: OPINION EVIDENCE. Before a witness is entitled to give his
3 opinion as to the ultimate fact of testamentary capacity he must
detail the facts within his knowledge upon which the opinion is
based; and even then his opinion is not conclusive. In the absence of
a showing of peculiar acts and conduct indicating unsoundness of
mind his opinion is entitled to no weight. The evidence of unsound-
ness of mind in the instant case was based upon physical weakness,
but in all business transactions the witness freely admitted that
testator seemed rational and capable of transacting the business in
hand.

Trial: DIRECTION OF VERDICT: WILL CONTEST: EVIDENCE. It is not
4 the duty of the court to submit a cause to the jury because there
is some evidence introduced by the party having the burden of
proof, unless of such a character as to warrant a verdict in favor
of the party offering it which will stand: and a motion to direct
a verdict should be sustained when from a consideration of all the
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evidence it clearly appears that a verdict for the party having the burden would have to be set aside if returned in his favor; but the party against whom the ruling is made is entitled to have all the evidence in his favor considered in its most favorable light. The evidence is held insufficient when thus construed to support a verdict for contestants.

Appeal from Hardin District Court.—HON. R. M.
WRIGHT, Judge.

MONDAY, FEBRUARY 23, 1914.

WILL contested on the ground that the same was procured by undue influence, and that the testator, at the time of making the will, did not have testamentary capacity. Verdict for proponents. Contestants appeal.—*Affirmed.*

E. P. Hudson, Aymer D. Davis, and E. P. Andrews, for appellants.

Lundy, Wood & Baskerville, B. P. Birdsall, and Kenyon, Kelleher & O'Connor, for appellees.

GAYNOR, J.—On the 12th day of October, 1907, J. H. Bales, resident of Hardin county, executed his last will and testament in which, after providing for the payment of his debts and funeral expenses, appears the following provisions:

II. I give, grant, bequeath and devise unto my wife, Sarah E. Bales, in lieu of dower, the one-half in value of all the property belonging to my estate, real, personal, and mixed, of which I shall die seised and give unto her the right to select from my estate what particular property shall vest in her by virtue of this bequest.

III. I give and bequeath unto James G. Bales, being the boy raised by me and now a resident of Hardin county, Iowa, the sum of ten thousand dollars and direct that said sum shall draw interest at the rate of four per cent. per annum from the time of the admission of this will to probate until the same is paid to the said James G. Bales, and direct that said sum shall be paid out of my estate by my executors within

two years from and after the time of the appointment and confirmation of such appointment of my executors, and further that such payment shall be made as soon as the same can be done without embarrassment to the administration of my estate by my executors.

IV. I give, grant and bequeath unto W. J. Murray, of Eldora, Iowa, in trust, as trustee only, the rest and residue of my estate with full authority and power upon the part of the said W. J. Murray to invest and reinvest the said portion of my said estate as he, the said W. J. Murray may think advisable from time to time and shall deem for the benefit of the said trust estate and direct that the said trustee shall, from time to time pay over to my said wife at intervals of not less than one year, the net income derived from the said portion of the said estate during the natural life of the said Sarah E. Bales, and I authorize and empower the said W. J. Murray, if by him deemed to be to the best interest of the said trust estate to make sale of any portion of the said estate which shall come into his possession by virtue of this bequest without first making application for authority therefor to the court.

V. At the time of the death and departure from this life of my wife, Sarah E. Bales, I direct that there shall be paid out of the residue of the said trust estate by my said trustee, W. J. Murray, the sum of five hundred dollars, to Lula S. Trout, daughter of B. B. and Jennie Trout, and one thousand dollars to Henry Bales, my nephew, a son of John L. Bales.

VI. I further direct that after the payment of the said two legacies provided for in the last preceding paragraph of this will that the residue and remainder of said trust estate shall vest as follows: The one-third to become the property of the said James G. Bales referred to in the third paragraph of this will; one-third to my friend W. J. Murray, and the remaining one-third to be equally divided between my two brothers, John L. Bales and W. S. Bales, and in case of death of either of the said John L. Bales or W. S. Bales prior to said distribution, then and in that case, the portion of the estate which should have gone to either of the said parties, John L. Bales or W. S. Bales, shall be paid to the legal heirs of the party whose death has thus occurred prior to such distribution.

VII. Finally I nominate and appoint as executors of this

my last will and testament, my wife, Sarah E. Bales, and my friend W. J. Murray, and ask that such nomination be confirmed by the court at the time this instrument is admitted to probate and that the executrix and executor shall not be required to give bonds in excess of the sum of five thousand dollars.

On the 19th day of December, 1911, the said J. H. Bales departed this life. On the 21st day of December, 1911, the foregoing instrument was filed with the clerk of the district court of Hardin county as the last will and testament of the said Bales. On the 19th day of January, 1912, the appellants herein, W. S. Bales and J. L. Bales, brothers of the testator, filed written objections to the probate of the will, urging: First. That the said J. H. Bales was not, at the time of the execution of the said instrument, of sound and disposing mind, but was incapable of making a will. Second. That the said will was procured and executed by fraud, duress, and undue influence exercised over him by Sarah C. Bales, James G. Bales, and W. J. Murray. A hearing was had on the issue at the March term of the district court of Hardin county. At the conclusion of all the testimony, on the motion of proponents, the jury was instructed to bring in a verdict in favor of proponents, and against contestants, and thereupon, an order was made by the court admitting said will to probate, and the same was duly probated as the last will and testament of the said Bales. From this order, contestants W. S. Bales and J. L. Bales appeal.

There was no evidence of any undue influence, exercised over the testator by the parties charged, which induced or provoked, or secured in any way, the making of the will in question, or that can be said to have controlled, or even directed, the mind of the testator in the disposition of his property as therein set out. We are therefore only concerned with the first proposition presented by contestants, to wit, Was J. H. Bales, at the time of the execution of the instrument, of sound and disposing mind and capable of making a will?

The law, as uniformly announced by this court is that a person is of sound mind who has full, intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons he desires should be recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty; but it is not necessary that he should have sufficient capacity to make contracts and do business generally, nor to engage in complex or intricate matters. In other words, it is said a party is competent to make a valid will who possesses a mind capable of exercising judgment, reason, and deliberation, and capable of weighing the consequences of his will to a reasonable degree, and the effect of it upon his estate and family.

1. WILLS: testamentary capacity.

It is proper, therefore, in determining the question herein under consideration, for us to examine somewhat into the relationship of the parties who are the subjects of his bounty, and to see whether or not therein lies any evidence of indifference to, or forgetfulness of, those who would naturally come into the mind of a reasonable and rational person as the ones fairly entitled to recognition and thoughtful consideration in making a disposition of his property. Upon this question see *Stutsman v. Sharpless*, 125 Iowa, 335; *In re Will Wharton*, 132 Iowa, 714; *Hardenburg v. Hardenburg*, 133 Iowa, 1.

2. SAME: evidence.

It appears from the record that J. H. Bales had no children. The record discloses that he entertained a high regard and a tender love for his wife; that he often, during his lifetime, spoke of her as having been of great assistance to him in securing his fortune, and that he intended to make ample provision for her. In the will this thought is exemplified and emphasized, and, as a good man should, he has made ample provision for her future. In this, there is no evidence of forgetfulness, nor indifference to the tie which had bound

him to her during the long years of their married life. It would seem to us to be an intelligent recognition and fulfillment of an intent long entertained by him and faithfully executed.

The boy, James G. Bales, seems to have been next in his consideration. To him a large bequest was made, and why? The record shows that this boy, commonly called Jimmie, was born in Hardin county; that his father died when he was eighteen months old; that he came to live with J. H. Bales, when he was three years old, and continued to so live until his marriage; that he went through high school in Eldora, the home of the testator, and graduated in 1903. Then he went to Penn College one year. He came back to Eldora and worked in a hardware store for a time, and then went into a store in New Providence, purchased by J. H. Bales; that he became interested in that store in 1905. On his twenty-first birthday testator gave him a one-eighth interest in the hardware stock, and also one-eighth interest in New Providence Bank, the only consideration there being \$1, love, and affection; that the interest at that time was valued at \$1,000; that he continued in the hardware business at New Providence until 1908, until the stock was disposed of; that at the time he was five years old he took the name of Bales, and has ever since been known by that name. It appears that the relationship between Mr. Bales and Jimmie, during all the years that he resided with Mr. Bales, was substantially that of father and son; that in addressing Mr. Bales he called him father. As early as 1905, in conversation with one J. C. Cox, who was a witness in this case, he said that they were urging him to give money to Penn College, but he did not know what he would do about it. "I expect my wife will have the majority of my property, at least during her life, and we consider Jimmie very much as if he were our own boy." At other times he said Jimmie was a good boy and had never disobeyed him, and he expected to see that he was comfortably fixed, and we gather from the record that he was very fond of

Jimmie, and had a great interest in his welfare, and that this continued up to the very time of, and after, the making of the will in question.

As to the other beneficiary, the record discloses that he also was born in Eldora; that he had known Mr. Bales since he was a small boy; that he went to work for Mr. Bales in 1892 in the bank; that he did chores for him before that time; that in the spring of 1892 he went to Ames with the expectation of starting to school there, to work his way through; that on his return Mr. Bales asked him to work for him; that he gave up the school, and from that time continued with Mr. Bales; that he worked in the bank as a sort of errand boy, learning the bookwork, in the meantime familiarizing himself with the work until he was advanced to the position of assistant cashier in 1895. In 1896 he was elected cashier, and remained as such until 1906, when he was elected vice president; that Mr. Bales was president of this bank from the time it was organized until July, 1908; that during the twenty years he was with Mr. Bales about the bank he frequently attended private business for him; that there was never any change in their relationship to each other; that in speaking of Mr. Murray, he said: "I don't know that I could think any more of him if he were my own son. I think so much of him and I expect to remember him when I get through with my property." On one occasion he said Murray deserved a good deal of credit in the way the business had succeeded, and he felt sometimes as though he had underpaid Murray for his services. In conversation with one J. C. Armstrong, in the spring of 1907, in speaking of both Jimmie and Murray, he said: "I have made provision for Jimmie. We raised him, but he is married, now, and I feel that we ought to make more ample provision for him." He said that he had taken Murray out of school, and he had been with him ever since.

One Dr. Koeneman, as a witness, stated: "I had a conversation with Mr. Bales some time prior to October 12, 1907,

on a train going up into Minnesota in which he gave me his personal history. He spoke of his early life and his business. Spoke of Mr. Murray. Said he had taken him when a boy, and took great pride in his business ability, and spoke in praise of the work he had done for him in the bank.”

It does not appear that the contestants herein, during all the years of testator's struggle in the world of business, were in any way associated with him, or that they had any claims upon his bounty except those which might naturally be expected from the ties of blood. It appears that at one time one of these contestants contemplated caring for the mother of J. H. Bales, of whom testator seems to have been very fond; that at the time he made some suggestion to the effect that he would remember him in the disposition of his property. But it seems from the record that the mother never resided with this son after he was married in 1884. Thereafter she continued to live with, and was cared for, by J. H. Bales until her death. This appears to be the only fact upon which he bases his claim to special recognition.

It appears, further, that the visits between the brothers were only occasional, about a year apart. The father of these boys died in 1880, when the contestant, W. S. Bales, was about twenty years of age; that the mother died in 1896; that this W. S. Bales was married in 1884; that the mother never lived with him after he was married. J. L. Bales, the other contestant, was not a witness on the trial.

Upon this branch of the case, we find nothing in the will, nothing in the disposition made of the property, that would suggest that it was not made by the testator in a full recognition of the obligation, if any, which he owed in the disposition of his property, to those fairly recognized by him as entitled to his bounty. It would rather appear that, in the disposition, he recognized those ties and claims and obligations which a man of ordinary intelligence and rational judgment would have recognized as binding upon him. He gave the property to those to whom he had every reason to be

grateful; the wife; the boy whom he raised with the affection of a father; the man whom he had taken into his confidence, and who had helped him to success. There is no indication of unsoundness of mind in the disposition of the property when looked at from this viewpoint.

But it is contended that, notwithstanding the fact that the provisions of the will may seem to be just and equitable and to indicate the action of a normal mind, yet that the evidence which has been offered was such that it was a question for the jury as to whether or not he was, in fact, in possession of testamentary capacity. The evidence upon this proposition is voluminous. No good purpose would be served in setting it out in detail. We have examined the record carefully, both as it appears in the abstract and amendment to abstract, and we are satisfied that, as to the ultimate fact which the evidence tended to prove, there is very little difference between the witnesses.

The opinion of witnesses is not controlling when the mind is searching for the ultimate fact. The opinion of witnesses, whether they be expert or non-expert, as to the ultimate fact of testamentary capacity, while
8. SAME: opinion evidence. entitled to be weighed and considered by the court, is not conclusive upon the issue. The mere opinion of a non-expert witness, based upon no fact from which even an inference of unsoundness could be drawn, is not entitled to any weight. Before a non-expert witness is entitled to give an opinion as to mental soundness, he must be able to state, must state, facts within his knowledge or observation which tend to show the party to be of unsound mind. Before he is entitled to express an opinion upon this issue, he must state peculiar acts or conduct which indicate unsoundness of mind.

Every nonexpert witness called, who testified as to the mental condition of the testator after and prior to the time of the making of the will, predicated his conclusion that he was not of sound mind almost entirely upon the physical condition of Mr. Bales as it appeared to them. The physical con-

ditions mainly relied on were physical weakness, expression of the countenance, the appearance of the eye, and slowness of speech, and remarks made by Mr. Bales touching his physical health; that he seemed to be failing in health; that he was not as quick in his movements; that he was slower in thought, but every witness, when examined touching any business transaction with Mr. Bales, freely admitted that he seemed perfectly rational and capable of transacting the business in hand. This as late as September 1, 1907.

Take for example, the testimony of Elkanah Reece, who testified on the part of proponents:

In the spring of 1907 I spoke to Mr. Bales about getting a loan from the Penn College Endowment Fund. I didn't want the loan until September. He said he thought he could get it all right, but they didn't have the money on hand at the time. But he said: 'I guess I can fix it. I can fix it some way. I just don't see how.' A minute afterwards he said: 'Oh, yes, I see how. We can just take some money out of the bank and furnish you the amount you want, and when the endowment fund comes in, we can replace it in the bank again. I don't see business as readily as I once did.' He said he couldn't think as quick as he once did. Between that and the last of September, 1907, I saw him again, and he said, 'We have the money that you want.' On the 30th of September, I went up to finish the loan. I found Mr. Bales down home. I told him I was ready to get the loan. He said: 'I am not going to the bank now. Warran Rathbone will attend to that for you.' I think I noticed a difference in his eye. There was a lack of the same ability in his expression. Speech was not prompt, somewhat hesitant. We talked about the loan. He said that he had explained the matter to Mr. Rathbone. The loan was for \$5,200, to be secured by a mortgage on a farm of three hundred acres. I discussed the terms of the loan with him. He told me he could furnish me the loan at 5 per cent. interest for ten years. The loan, the land, the rate of interest, and the terms were discussed between us. When I went to the bank, I found Mr. Rathbone had been apprised by Mr. Bales of the terms and conditions of the loan, and I closed it up satisfactorily with him; just exactly as Mr. Bales had agreed.

George B. Spears testified:

I had a business transaction with Bales in August, 1907. Traded my house for a farm in Kansas in which he was interested. On my way home with him one day I told him I was going to Kansas to look at a farm with Charlie Ryan. He said he had a farm there, too, not far from the place I was going, and said: 'If you don't make a deal, I would like to have you see this farm. I believe we could make a deal. Mr. Ryan knows about the farm, and I will see him and have him show it to you.' September 1, 1907, I had another conversation with him about it. In the meantime I had been to Kansas. He said, 'Well, you didn't make the trade?' I said, 'No.' He asked if I had looked his farm over and I said I had, but I couldn't quite make the deal. 'Well,' he said, 'come into the back room of the bank. Maybe we can make it yet.' I told him I had made an offer to Ryan on Bales' land, and would stand by it. We talked about it some time, and I afterwards concluded the deal and traded my home for the Kansas land.

J. W. Peisen testified:

I had a transaction with Bales about the 8th of September, 1907, at his bank. At the time the panic broke, I had made a contract for 240 acres of land in Minnesota, and had paid \$500 on the contract, and the financial situation frightened me a little. I went to see Mr. Bales about arranging for meeting the proposition, and being prepared to close it on March 1st, that being the date of the settlement on the contract. I went over the facts with him, and he assured me he would take care of me up to \$8,000. He said he would furnish the money for \$8,000 above the first mortgage, or he might prefer to take up the first mortgage and carry the \$8,000. However, he advised me to dispose of the contract if I could. I had done business with him before, and had taken his advice. I noticed no change in his manner of doing business at that time.

J. A. Johnson testified that he was a depositor in the bank and had done business with Bales.

I talked with him in October, 1907. Saw him twice on that day in the bank. I wanted to get a man's note renewed. He looked up the record and saw that I had two more notes against the party, and he advised me not to renew it because it was past due. He advised me to get this note paid before the other was renewed. I notified the party that the note could not be renewed, and he paid me the money. I had another conversation with him about the 1st of November. I had to make up some money for the International Harvester Company, and I took the notes over to the bank, notes of farmers. Mr. Bales suggested the best thing to do was to go to Cedar Falls and see if I couldn't turn in the notes as cash to the company. I went to Cedar Falls. I had a talk with him when I returned. I got the notes together, and he picked out what notes he wanted. Short-time notes, and the long-time notes I sent to Cedar Falls. He discounted about \$1,800 of these notes. He gave me credit in the bank for the notes he discounted. He said he could handle the short notes the best at that time. He told me I should be pretty careful how I handled paper; to get as much cash down as possible, and to take short-time notes. He said money was getting pretty short in the East, and to be very careful in business. I noticed no change in his manner of transacting business.

Charles O. Ryan testified:

I talked with Bales about the trade of the Kansas land in 1907 and about other land. I had a deal with him in July, 1907, and he renewed a loan for me of \$3,000. Spent a half a day with him on November 5, 1907. He talked about the bank's shutting down, the Elzig suit, and the Wisner suit. He spoke of being a witness in the Wisner suit. This was before he went to Colfax. He talked the same as he always talked to me. I thought he was sick, but observed no change in his mental condition.

J. C. Armstrong, called as a witness, testified as to business transactions with Mr. Bales during the summer and fall of 1907:

That Bales visited Jimmie at New Providence, and was in the hardware store in which Jimmie was a partner, and

he said he was a little uneasy about Jimmie's wife's health, and he believed he better dispose of the hardware stock; that he contemplated going South, and he wanted Jimmie and his wife to go with him. He offered me ample time to get a partner. He gave me sixty days. About the 1st of October, I came to Eldora and had a talk with Bales. Bales and Jimmie took my share of the stock about November 15, 1907. He ran over the stock and made an estimate. He advised me to be careful in buying stock; to know where the money was coming from to pay for it. I saw Mr. Bales on the morning of September 2, 1907. I saw him when he drove into town. He asked me if I could let Jimmie go with him to the farm. He said his stomach was bothering him; that he wasn't feeling very good. In about half an hour, they drove over to the farm. He spoke of having eaten a hearty breakfast, that they had something that suited him, and that he ate too much. We talked about Jimmie. He said he was well satisfied with Jimmie's progress in business. During the whole time, I observed no change in his manner of talking or doing business.

Most of the testimony of the nonexpert witnesses, touching the mental condition of Mr. Bales, relates to a time several months subsequent to the making of this will. However, all the facts stated on which they predicate mental incapacity, disclose physical weakness; appearance apparently superinduced by physical weakness, rather than by mental unsoundness. We do not pretend to set out all the testimony given by nonexperts, but have set out herein substantially the testimony of those with whom Mr. Bales transacted business at or about the time of the making of the will, and from this it is made to appear that, however much his physical condition may have been impaired, his mental vigor was not thereby seriously abated up to, and at the time of, the making of the will.

It appears that prior to October, 1907, and some time in February, 1905, Judge Albrook prepared a will for the testator, in which he gave to Jimmie (named in the will in controversy) \$5,000 at the time of his death, and \$5,000 on the death of Mrs. Bales, and gave to the nephew named in the

will \$500; the will in other respects being substantially as the will now under consideration; that at the time the will in question was executed he came to Judge Albroom, spoke about the will previously prepared, and said he had made up his mind to change it in some respects, and wanted to know if it could be done by amendment or addition to it.

I asked him what changes he proposed to make. He said he intended to change it so that Jimmie would not have to wait until Mrs. Bales' death to get the second \$5,000; that he wanted Jimmie to have \$10,000 at the time of the settlement of the estate; that he wanted to give his nephew \$1,000 in place of \$500. I said to him then: 'This can be done by making a codicil, but I don't like a codicil very well. Sometimes it leads to controversy. Your will is not very long, and you might have it re-written.' He then went out of the office and afterwards came back with the will in question written out in his own handwriting, and submitted it to me and said, 'What do you think of that?' I looked it over and said I thought it was all right. 'Well,' he said, 'it don't look very well. I think you better have the girl copy it.' It was then turned over to one of the girls in the office and copied. He came afterwards and took it out. At the time he made the change in his will, October, 1907, I saw the will he had made, in February, 1905, and I saw the changes which were made by the will of October, 1907.

It appears that Mr. Bales, for some time after making the will, was president and director of the bank and active in its management; that he was guardian of the Wisner estate, acted as treasurer of the board of trustees of Penn College, and up to the time of the financial crisis of 1907 he talked intelligently about the condition of his bank, and gave reasons why he believed that the bank would not be financially embarrassed by the panic; that he attended a meeting of the bankers of Hardin county in the latter part of October, or the first part of November, 1907, and took part in the discussion. This meeting was called for the purpose of determining what the bankers of Hardin county should

do in the event the panic continued; that as late as November 24, 1907, he wrote letters touching the business which he had left behind, and directed his attorneys as to the conduct of certain litigation that was then in progress in which he was interested. These letters are too numerous to even set out extracts, but they all indicate a clear understanding of his relationship to the business which he had left behind.

Expert witnesses were called to testify as to the mental condition of the testator. One Dr. Getman testified that he had seen him frequently upon the streets; that he observed him; noticed his health was failing in 1906 and 1907; that Bales often passed him on the street without speaking to him. Witness thought he did not recognize him. As far back as 1907 he noticed that he was nervous and in ill health, and did not converse with his usual ability. This was prior to the making of the will; that he met him afterwards at Colfax in March, 1908; that in conversation, he did not pursue the subject to the end, but frequently changed from one subject to another. However, he testified that he knew he did business in 1907, but he had no business transactions with him, and could not say whether or not he had sufficient mind to comprehend his property, recognize his family, or had correlative ideas between his property and property rights and his family and family rights; that he never talked with him on these subjects; that he could not say whether he had sufficient mental capacity to have an understanding of his property and its value, and yet he testified that, in his judgment, he was unsound of mind on October 12, 1907.

Dr. Turner, with whom testator stayed at Colfax, said he met Bales first November 14, 1907, at the sanitarium. Stayed there until about February 21st, and was treated. His trouble was arterio sclerosis. When he came there, he was physically and mentally worn out. He was irritable, restless, and forgetful. He would sometimes lose himself and forget where he was going and where he belonged. From the time he came until he left he was gradually growing

worse. He did not talk much while there. He was rather secluded. That is a characteristic of the disease. "I think when he came there, he was of unsound mind. He would eat his meals hurriedly and go back to his room. His wife would sit for hours entertaining him playing games. His wife told me his business was worrying him. He was having a lawsuit about that time in regard to a horse, and there was the settling of some estate that was worrying him. I took Mr. Bales on December 4th to Des Moines to Dr. Hill for consultation." On this he predicates the opinion that he was of unsound mind. On cross-examination, he said:

Mr. Bales told me he was having some trouble about a lawsuit. He was worrying about it naturally. I was not surprised that he got turned around in Colfax. Many people do on account of the way it is laid out. He paid me for my services by check signed by himself. I do not remember any statement made to me when Mr. Bales was there that was not a rational statement. He did not like the place. Mr. James Bales and his wife were down to see him several times. Mr. Murray and Judge Albroom were down to see him on business. I told Judge Albroom that Bales was able to talk with him on a business matter, and would be able to go over any business proposition. I thought he was able to do business to a certain extent. I think he was able to do business at the time to the extent of realizing property and its value. This was about the 1st of April, 1908. Unsoundness of mind is in various degrees. It may be slight, or such as disqualifies one from doing business. The subject may be able to transact the ordinary affairs of life. I think at that time he could comprehend ordinary business transactions.

Then he was asked these questions, and made the following answers:

Q. Assume that Mr. Bales on October 12, 1907, had before him an instrument in writing, one clause of which read as follows: 'I give and bequeath unto James G. Bales, being the boy raised by me and now a resident of Hardin county, Iowa, the sum of \$5,000.00.' Do you think from the examination of Mr. Bales that he would know at the time who James G. Bales

was? A. I think so. Q. And do you think that if he had that instrument before him he would know that James G. Bales was the boy that was raised by him and was a resident of Hardin county? A. I think so. Q. Do you think he would have mind enough at that time to know or to rationally conclude whether he wanted to make it \$5,000 or \$10,000? A. Yes. And with the matter before him—I think he would know whether he wanted to make a bequest of \$5,000 or \$10,000, and if he had the instrument before him, one clause of which read as follows: ‘At the time of the death and departure from this life of my said wife, Sarah E. Bales, I direct that there shall be paid out of the residue of the said trust estate by my said trustee, W. J. Murray, the sum of \$500.00 to Lula S. Trout, daughter of B. B. and Jennie Trout and \$500.00 to Henry Bales, son of John L. Bales, I think he would have sufficient capacity of mind to know who Henry Bales was, and would know who John L. Bales was, and he would know whether he wanted to give to Henry Bales, \$500 or \$1,000, and I think he would have capacity also to know what the difference was between the payment of a sum of money at his death and the payment of a sum of money at the time of his wife’s death.

Dr. Hill, called as an expert witness for contestants, said: “I met Bales in my office on December 4, 1907. He was in my office about one hour.” He was then asked this question, “Now you may state what he told you at the time in relation to himself and his past history.” To which the doctor made the following answer:

He said that he was born in Tennessee, and that he lived there a few years, and that he had been living in Iowa most of his life, and for, I think he said, thirty-three years in Hardin county. He had been a merchant, he had been a county treasurer, and he had been in a bank for fifteen years. And I inquired about his father and mother, and he said that his father died at fifty-seven of apoplexy, and his mother died at seventy-five of old age, and that he had no sisters, but two brothers, one, he said, was fifty-seven, and the other sixty-nine years old. He said he had a wife to whom he had been married thirty-three years, but no children. He said he had taken a son to bring up, and that he had been in the army,

and went on, I think, he said he had typhoid fever when he was twelve years old, but got over it, and it didn't do him any permanent harm, that he had not been a rugged man, but that he had never been sick in bed very much, and the rest of the record, as I remember it, was that the first time that he became alarmed about his present condition for which he consulted me was when he went over to New Providence to show a man a farm, which was either in September, 1906, or 1907, and that he got very tired, and that he got confused, and didn't realize where he was, or what the people said to him. He said that he came in in about half an hour; that he rested a few hours at the home of his son, I believe it was, and lay down there, and lay there in the day; probably in the evening this son brought him back to New Providence, or to this town, Eldora. After his return, he stayed at home. I think he said he remained in bed some days, and he said he had been tired and weak ever since, and that he had heat in his head, and felt a kind of a fullness in his forehead, and that he sometimes had a dizzy feeling. He thought he had some trouble with his heart; that he never had much trouble about his sleeping. I understood him to say he always was a good sleeper. He said, I believe, that he had given up business, and was taking a rest at Colfax, where he had been for three weeks—(all of which the record shows to be substantially correct). From his description of the case it seemed like the history of neurasthenia, or nervous prostration, or brain fag, or a tired condition of the mind, and from this, with an examination of the heart and pulse, I concluded he was suffering from arterio sclerosis. The development of this disease is very gradual. It is a wearing out of the arteries. It is common to people who live to be very old. It is brought on prematurely by using alcohol or tobacco. The progress of the disease would be gradual for many years. Its effect on the brain is to weaken it and to interfere with its functions. Its effect is to destroy the brain itself and the brain tissue. It is gradual, and finally results in softening of the brain which terminates life.

Thereupon he was asked a long hypothetical question and answered that he believed Bales was of unsound mind. Dr. Hill further testified:

People may suffer with the disease, and it is impossible to say in a given case that the mind is diseased or affected until there is some manifestation from the mind itself. I observed that Mr. Bales was an invalid; that he had disease in the circulatory system, in his arteries and heart, and yet that disease of the arteries and heart would not produce mental derangement. The disease of the arteries and heart may have been in progress for years without producing any serious effect upon the mind. So that up to the time that a point is reached in the progress of the disease, that the mind has become seriously affected, the patient is able to comprehend what he is doing. When he visited me, Mr. Bales comprehended what I asked him, he gave me the members of his family, the age of his father and mother when they died, and the disease they died of; the names of his brothers and sisters, and their and his personal history from birth to date; he recalled them all, and, so far as I know, correctly. I didn't ask him anything about his property. I got that from Dr. Turner.

The rule governing the court in the disposition of a motion for a directed verdict at the close of the evidence is that it is not the duty of the court to submit the case to the jury because there is some evidence introduced by the party having the burden of proof, unless that evidence is of such a character that it would warrant the jury in finding a verdict in favor of the party introducing such evidence. Before the question is left to the jury for its determination, the preliminary question for the court is whether there is any evidence to support the verdict, and, if so, whether upon such evidence the jury can find a verdict for the party producing it that will stand.

It is said in *Pleasants v. Fant*, 22 Wall. 120 (22 L. Ed. 780) :

It is the duty of a court, in its relations to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful right in the conduct of a trial. This is done by making plain to

4. TRIAL: direc-
tion of ver-
dict: will con-
test: evidence.

them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else, by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor.

It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence in support of the case, but it is now settled that the question for the judge is, not whether there is literally no evidence, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. This rule has been adopted and followed in this state for many years.

In *Meyer v. Houck*, 85 Iowa, 327, this court said: "It will be seen from what we have cited that the whole turn of legal thought in this country and in England is contrary to the rule of practice which requires a court to go on for several days with the trial of the case to a jury when the verdict must, in the end, be either for the defendant, or be set aside if for the plaintiff. . . . Our conclusion is that when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all of the evidence, it clearly appears to him that it would be his duty to set aside a verdict if found in favor of the party upon whom rests the burden of proof. . . . He has no right to insist that the trial of the cause be continued as a mere idle form, or a mere experiment, that he may have the gratification of securing a verdict which must be set aside."

We recognize the rule that the party against whom the ruling is made is entitled to have all the evidence in his favor considered in its most favorable light. In the consideration of this case we have done this, and find, upon the whole record,

that a verdict for these contestants would not have support in the evidence sufficient to maintain a verdict in their favor based thereon.

Some complaint is made of the rulings of the court on the introduction of evidence. We have examined these points with care, and find no reversible error committed by the court in this respect. The objections were sustained by the court in many instances from the manner in which the question was propounded, rather than because of the substantive facts sought to be proved. This is very marked in the examination of the nonexpert witnesses, in which it was sought to be shown, by the mere conclusion of the witness, substantive facts on which to predicate an opinion on the unsoundness of the testator's mind, and this is rightfully excluded.

We find no error, and the case is *Affirmed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

H. W. SPAULDING, ET AL., Appellants, v. W. A. LAYBOURN, Appellee.

Evidence: CORROBORATIVE EVIDENCE: STATEMENTS OF PARTY. Where

- 1 a party upon the eve of trial amends his pleading, thus injecting a new demand into the case, and the other party offers evidence tending to discredit the same as an after thought, manufactured for the purpose of the case, it is permissible for the party making the demand to show that he made a similar claim about the time of the transaction involved, and that he advised his attorneys of the same at the time he laid his case before them.

***New trial:** REVIEW OF MOTION. Where the trial court makes no find-

- 2 ing of facts upon the affidavits and counter affidavits, in support and resistance of a motion for new trial, the appellate court will not consider the same.

Same: MISCONDUCT IN ARGUMENT. A statement of counsel in argu-

- 3 ment to the jury that plaintiff was attempting to back out of an alleged oral contract as the evidence showed he had done in other

instances, was not such misconduct as to justify the appellate court in interfering with the discretion of the trial court in ruling upon the question.

Submission of issues. Where there is evidence in support of a claim,
4 though contradicted, the issue is for the jury.

Compromise and settlement: EVIDENCE OF. An oral offer of compro-
5 mise and settlement of a suit is not admissible in evidence; and efforts of counsel to get the matter before the jury, persisted in to the extent that the jury is fully advised on the subject, is reversible error, even though the jury were instructed not to consider the same.

Appeal from Poweshiek County District Court.—HON. JOHN F. TALBOTT, Judge.

MONDAY, FEBRUARY 23, 1914.

ACTION to recover a sum of money which it is claimed defendant, as plaintiffs' agent, retained from them under a claim that it was due him under his agency contract. Defendant pleaded that he was entitled to the money as compensation for his services, while plaintiffs assert that he had been fully paid and was wrongfully detaining the sum of \$4,124.13. On the issues joined, the case was tried to a jury, resulting in a verdict for the defendant in the sum of \$295.87, with interest, upon a counterclaim filed by him. Plaintiffs appeal. —*Reversed and Remanded.*

A. C. Lyon and W. R. Lewis, for appellants.

Bray, Shifflett & Lake, for appellee.

DEEMER, J.—It is agreed that defendant was plaintiffs' agent in the state of Texas for the sale of certain vehicles made by plaintiffs, and the real controversy is over the nature of that agency, or rather upon the amount of salary and commission to be paid. Defendant admitted that he had made

collections for plaintiff amounting to the sum of \$4,124.13, but claimed that he had applied the same on commissions due him, and he also filed a counterclaim against the plaintiffs, in which he asked judgment for additional services rendered, amounting to \$1,265.87. An additional counterclaim for \$975 for services rendered after December 31, 1908, was pleaded by defendant, based upon the following letter and telegram:

Dec. 26, 1908. W. A. Laybourn, Austin, Texas: Letter received, keep men and sell all vehicles you have on hand. See letter. S. M. Co.

December Twenty-Sixth, 1908. Mr. W. A. Laybourn, Austin, Texas—Dear Sir: We have just telegraphed you as per the inclosed copy of telegram. Now in regard to closing out, we want you to close out all the vehicles you have on hand and we want you to keep the teams and men until you do get them closed out, but as fast as you can we want you to let the men go to the new superintendents. Mr. E. H. Spaulding has written you in regard to this, and we expect Mr. D. F. Warren will be down there in the near future. I will write you more fully in regard to this a little later. Yours very truly, Spaulding Mfg. Co., by H. W. Spaulding.

The plaintiffs' reply to the last counterclaim was in substance as follows:

That the claim is for work and business that he did in the selling and delivering of buggies under the contracts involved in this case, other than that alleged in said count, and was for labor and business that he did in completing sales made under said other contracts for which he has been fully paid by the commissions of \$2 per vehicle, and was labor and business performed by him after the termination of the contracts, because he was unable or refused sooner to complete the business which had been done under the said contract, and that the telegram and letter set out in the counterclaim have no reference to any new contract or employment or any new labor or business, but only requested that the defendant finish up the business for which he was receiving \$2 commission for the vehicles sold and delivered by him.

On these issues, the case went to trial to a jury, resulting in the verdict hitherto stated. Several points are relied upon for a reversal, and to such as are material we now give our attention.

The primary controversy is over the nature of defendant's initial contract. He claims that he was to have a commission of \$2 for each and every vehicle sold by him, his agents, or by plaintiffs themselves, through other agents, or from the factory direct, to any person within the state of Texas; while plaintiff insists that his compensation was to be based upon sales made by defendant or through his agency alone. In addition to this, there is a controversy as to the nature of defendant's employment, as pointed out in the answer already stated. The jury evidently found with defendant on both of these issues. While something is said in argument regarding the sufficiency of the testimony, the proposition is not argued, and we give it no further attention. The main points relied upon for a reversal are based upon misconduct of counsel and erroneous rulings said to have been made by the trial court.

I. In order to understand one of the matters complained of, it is necessary to make a further statement as to the record. In the answer and counterclaim first filed by defendant, he relied upon certain written contracts between

1. EVIDENCE :
corroborative
evidence :
statements of
party.

him and the plaintiffs. This answer was filed November 21, 1910. Thereafter, and on January 11, 1911, plaintiffs demurred to the counterclaim, and the demurrer was sustained on February 2, 1911. After the disposition of certain answers, demurrers, etc., defendant on September 23, 1912, filed a substituted answer and counterclaim, in which he relied upon an alleged oral agreement with plaintiffs to pay him the commission claimed, and this was the pleading on which the defendant relied. As part of the examination of one of the plaintiffs, he was asked the following questions, to which responses were made as shown :

Q. I will ask you whether or not Mr. Laybourn at any time during the years 1907 and 1908 said anything to you about having an oral contract that you were to pay him a commission on sales made in Texas by you and your men? A. He did not. Q. I will ask you when is the first time you ever heard anything about such an oral contract? A. It was made when he made it in this suit here. Q. Do you mean when he filed his pleading? That is the first time you ever heard that he claimed an oral contract. A. Yes, sir. Q. I will ask you whether he had ever told you that he claimed that he had that right under the original written contract? A. Yes, he claimed that he had it under the original contract a good many times.

And another of plaintiffs testified to the same facts, and also to the effect that defendant never at any time, during any of their controversies before suit or after, until the filing of his substituted answer and counterclaim, suggested that he had an oral contract or was claiming on anything but his written one, the latter of which the trial court thought did not support the defendant's contention. This latter witness also testified on cross-examination as follows:

Then he (defendant) told me in regard to a contract with H. W. Spaulding in former years. He stated that, although he had made a verbal agreement at the time he signed the written contract, that he just thought he would ignore that, or he might ignore that and abide by the written contract and put the Spaulding Manufacturing Company up a tall tree, and collect \$2 a job on jobs that he had nothing to do with himself in Texas.

When defendant was called in rebuttal, the following record was made:

At the time and prior to the time the substituted answer and cross-petition in this case, which is marked Exhibit No. 20 Robison, and the original answer and cross-petition in this case, which is marked Exhibit A8 Robison, I discussed this case with my attorneys. Q. Did you at that time tell your attorneys all of your causes of action and all your defenses

to the case which was brought against you? (Objected to as irrelevant, immaterial, incompetent, and hearsay. Overruled, and the plaintiff excepts.) A. I did. Q. What did you tell them? (Same objection. Sustained, and defendant excepts.) Q. You may state whether or not before the pleadings were filed in this case, and in the case you brought yourself against the Spaulding Manufacturing Company, for the commissions claimed in the present suit, you told your attorneys about the oral contract made in February, 1907, and to which you have testified in this case. (Same objection, and calling for a self-serving declaration. Overruled, and plaintiff excepts.) A. I did. Q. You may state whether or not you told them all the facts and directed your attorneys to proceed, as in their judgment might seem best, in the answer or other pleadings. (Same objection. Sustained, and defendant excepts.) Q. You may state whether or not you yourself read, drew, or prepared any pleadings in this case, or, saw them until after they were filed. (Objected to as incompetent, irrelevant, and immaterial. Overruled, and the plaintiffs except.) A. I did not. Q. You may state whether or not you instructed your attorneys to draw them. A. I did. Q. You may state whether or not, before any pleadings were filed in this case, your attorneys instructed you that in their judgment it would be simpler if you could show a liability for commissions for your claim under the original contract without anything else; that it would be simpler to try the case based solely on that cause of action. (Objected to as incompetent and hearsay. Sustained, and defendant excepts.) Q. Did you have anything to do with, or did you sign, any pleading in this case, except your answer and counterclaim to the substituted petition? (Objected to as not the best evidence.) Court: You may answer whether you signed any other. (Plaintiffs except.) A. I don't recollect of signing any others. Q. Did you instruct your attorneys what to allege, what they were to put into any pleading that has been filed in this case? (Objected to as hearsay. Sustained, and defendant excepts.) Q. Did you tell your attorneys what to allege or put into any of the pleadings which have been filed in this case? (Same objection. Sustained, and the defendant excepts.)

It will be noticed that most of plaintiffs' objections were sustained, and that about all which the witness was permitted

to testify to was, that he told his attorneys his entire case. There was no error here prejudicial to the plaintiffs. Indeed the court might have, perhaps, been more liberal with the defendant. The object of the testimony offered by plaintiffs as to when they first heard of the oral contract was to discredit defendant's story and to convince the jury that it was an afterthought, manufactured, perhaps, for the purposes of the case. In such circumstances it seems to be the universal holding of the cases that it is permissible to show that he made similar statements soon after the transaction; and, in case of conflicting statements made by him, those first made may be supported by similar declarations about the time they were made. *State v. Vincent*, 24 Iowa, 570; *Green v. Cochran*, 43 Iowa, 544; *Rhutasel v. Stephens*, 68 Iowa, 627; *Boyd v. Bank*, 25 Iowa, 255; *State v. Cruise*, 19 Iowa, 312.

II. Misconduct of counsel for defendant in argument to the jury was made a ground of the motion for a new trial. This misconduct was attempted to be shown by affidavits which

2. NEW TRIAL:
review of
motion.

were met by counter affidavits, and the trial court made no finding of facts thereon, save as this may be inferred from the ruling on the motion. In such circumstances there is, as a rule, nothing to be considered by this court. *Ricker v. Davis*, 160 Iowa, 37.

At best we may only consider the admission made by the defendant's counsel in his affidavit, which reads as follows:

That during my closing argument to the jury in said case I did not say that the plaintiff H. W. Spaulding was attempting to go back on the contract which he made with the

3. SAME: miscon-
duct in argu-
ment.

defendant Laybourn just as he always did, but the statement which I did make to the jury in my closing argument at the time referred to in the affidavits attached to plaintiff's motion for a new trial was this: That the plaintiff H. W. Spaulding had made the oral contract with defendant as claimed by defendant, and that the plaintiffs were now attempting to go back on it just as they had done in other instances; that before finishing

the sentence W. R. Lewis, one of the attorneys for plaintiffs, asked me to repeat the statement; that I did repeat the statement and then finished the sentence by adding that I had reference to the testimony which had been introduced showing that plaintiffs had authorized Mr. Laybourn to make a settlement with one Parker, who had been formerly in the employ of plaintiffs; that Mr. Laybourn had settled with him by agreeing to pay him \$400; and that the plaintiffs refused to stand by and carry out that agreement.

This being the record, there was no such misconduct as to justify our interference with the discretion lodged in the trial court. *Hannestad v. Railroad Co.*, 132 Iowa, 232; *George v. Swafford*, 75 Iowa, 491; *Hammond v. Railroad Co.*, 49 Iowa, 450.

III. The only complaint made of the instructions is that the trial court refused to take the second count of the counter-claim away from the jury. There was no error here. There was testimony to support it, although contradicted by the plaintiffs, and the issue was for a jury.

4. SUBMISSION OF
ISSUES.

IV. The only other proposition relied upon grows out of the following, as shown by the record:

Exhibit No. 15 Robison is a formal demand in writing, dated June 21st, upon the plaintiffs asking for number of vehicles sold in Texas between June 21, 1907, and September 19, 1907. I presented it to the plaintiff Mr. H. W. Spaulding. He did not furnish me the information I wanted. Q. State what he said about it, if anything. A. He said he would give me \$2,500 in settlement. (The plaintiff objects to the evidence as being an offer of compromise and not proper cross-examination. Sustained, and the defendant excepts. Plaintiff moves to strike out the answer of the witness for the same reason. Sustained, and the defendant excepts.) Court: The jury are instructed that, where evidence is stricken out, they are not to consider it for any purpose. The Court: You are not permitted to state any offer made by Mr. Spaulding, the plaintiff, at that time in the way of settlement. Q. You may

5. COMPROMISE
AND SETTLE-
MENT: evi-
dence of.

state whether or not you had any conversation with Mr. H. W. Spaulding at the time the written demand was presented; it being Exhibit No. 15 Robison. A. Only that other conversation. Q. Did you have a conversation with him? A. Yes, sir. Q. State what the conversation was. Tell the jury what you said and what he said. A. He said he would have to submit it to his attorney and see me later. Q. Did you have any other conversation about it? A. A brief conversation. Q. State what that was. State what he said. Judge Lewis: We would like to have the court indicate the nature of what he is to state, if anything. Court: You are instructed, in answering the question, that you may not state any proposition in the way of a settlement or compromise made by Mr. Spaulding, or any one on behalf of the plaintiff, in that conversation, otherwise you may state the conversation. A. There was only a brief conversation between us at that time. Q. State what it was. A. The substance of it was that he would not tell me the number of jobs had been shipped to Texas. Q. Is that all of it? A. There was some talk about a compromise and some propositions made. (Plaintiffs move to strike out the answer for the same reasons as last. Sustained, and the defendant excepts.) Court: Observe the direction of the court that you are to state nothing in the conversation about a compromise. (Defendant offers to show by the witness that when he presented to the plaintiff H. W. Spaulding the written demand, marked Exhibit No. 15, that he had a conversation with Mr. H. W. Spaulding with reference to said demand, and that said plaintiff then and there would not tell him the number of cars that had been shipped to Texas, during the periods referred to in the demand, but that he would pay \$2,500 in settlement therefor. Objected to by plaintiffs as being an offer to compromise a matter in dispute. Sustained, offer denied, and the defendant excepts.)

The witness being examined was the defendant himself. Some time afterward the following occurred in examining the same witness:

Q. Now, Mr. Lyon asked you about a conversation that took place between you and the plaintiffs just before you brought your suit. You may now tell the jury what that conversation was; what was said by them relative to it. Mr.

Lyon: We ask that the witness be instructed relative to any offer of compromise or settlement. Court: You may state the conversation, except that the witness is not permitted to state any matter of offer or compromise between you. Mr. Bray: The question is withdrawn; that is just what I was after. (Plaintiffs object to the statement as obviously intended to influence the jury; the question being improper.) Court: I don't think that will hurt anybody. (Plaintiff excepts.)

No complaint is made of the rulings of the trial court, save the last observation that nobody was hurt by the matter; but it is contended that counsel, with knowledge of the fact that the testimony was incompetent, or after a ruling that it was inadmissible, persisted in asking his questions and keeping the matter before the jury, and finally stated in the presence of the jury that he got just what he was after. That this latter matter was the fact that an offer of compromise and settlement had been made is reasonably clear from the record made.

Singularly enough, on the same day that plaintiffs filed their reply to the substituted answer, and when the case was called for trial, defendant in open court offered to confess judgment in plaintiff's favor for the sum of \$1,500 and costs, which plaintiff refused to accept. No reference was, of course, made to this offer, and it is referred to at this time simply to show that it was difficult for plaintiff's counsel to meet the offer shown to the jury as to plaintiffs' offer to compromise, although the jury were told not to consider it. The case seems to fall within the rule announced in *State v. Roscum*, 119 Iowa, 330; *Welch v. Insurance Co.*, 117 Iowa, 394; *Hood v. Railway Co.*, 95 Iowa, 331; *Henry v. Railroad*, 70 Iowa, 233; *State v. Helm*, 92 Iowa, 540.

The sting was quite as effective as if addressed to the jury in argument and, if counsel had there said that plaintiffs had offered to compromise and settle for \$2,500, the poison would have stuck, and the same ruling made by the

trial court, as shown by the record, would have been no antidote.

The court below correctly held that the offer of settlement was inadmissible. *Rudd v. Dewey*, 121 Iowa, 454, and cases cited. The authorities relied upon by defendant (*Milhollen v. McDonald Mfg. Co.*, 137 Iowa, 114; *Kassing v. Ordway*, 100 Iowa, 611; *Bayliss v. Murray*, 69 Iowa, 290) do not hold to the contrary.

We dislike to reverse the case on this ground, but counsel are required to keep within due bounds, and all oral offers of settlement and compromise should be kept secret just as much as a regular offer in open court, and neither party should have any advantage thereof or be made to suffer therefrom. The statute expressly says that a regular offer to confess judgment shall not be mentioned during the trial, and an oral offer to settle and compromise should have the same sanctity.

For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and Remanded.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

A. J. CALTRIDER and J. D. KISTLER, Appellees, v. SIMON P. SHARON, Appellant.

Evidence: MENTAL INCAPACITY: QUALIFICATION OF WITNESS. A non-
1 expert witness must not only first detail the facts and circumstances upon which his opinion of mental unsoundness rests, before he is permitted to give his opinion on that subject, but these facts must justify his conclusion to give it weight. The facts and circumstances detailed are held insufficient to qualify the witness to say that the party inquired about was incompetent.

Guardianship: MENTAL INCAPACITY: EVIDENCE. To authorize the ap-
2 pointment of a guardian for the property of an alleged incompetent, the evidence must disclose such unsoundness of mind as to render the party mentally unfit and incompetent to look after and .

manage his own affairs. Evidence held insufficient to authorize the appointment.

Appeal from Guthrie District Court.—HON. J. H. APPLEGATE, Judge.

MONDAY, FEBRUARY 23, 1914.

PROCEEDING for appointment of a guardian for a person alleged to be of unsound mind. Trial to a jury and from its finding, with appointment of guardian based thereon, the defendant appeals.—*Reversed.*

Ine D. Shuttleworth, and C. E. Berry, for appellant.

A. M. Fagan and Sayles & Taylor, for appellees.

WITHROW, J.—I. This proceeding was instituted by the plaintiffs, who are his sons-in-law, asking for the appointment of a guardian of the property of Simon P. Sharon, who it is alleged is incompetent to manage his ordinary business affairs. The cause was tried to a jury, and a verdict was returned finding that he was incapable of looking after and caring for his property, and that a guardian should be appointed. Following the verdict, a guardian was appointed, and from the order making the appointment and the verdict of the jury upon which it was based this appeal is taken.

At the time of the commencement of this proceeding, Simon Sharon was eighty-two years of age. On the part of the plaintiffs, the evidence tended to show that he was, and for years had been quite deaf, lame, and at a recent period had been ill for a time, but had recovered with but little, if any, impairment of his faculties beyond what they had been prior to his illness. He is illiterate, being unable to read or write, excepting that he would sign his bank checks and other documents. Up to the time of bringing this proceeding, there had been but little, if any, suggestion of his business incom-

petency. He was the owner of an eighty-acre farm which he had rented to a son, Altha Sharon, taking his notes for the rent, and later had entered into a contract to sell the land to the son for \$100 per acre. The plaintiffs' evidence also shows that one of the petitioners had at different times sought to persuade Mr. Sharon to intrust the management of his business to him, but such proffer of assistance was refused, Mr. Sharon asserting that he was able to care for his own affairs. This son-in-law, Kistler, was in the dray business, residing in Casey. He had at one time desired to rent the farm of Mr. Sharon, and says that it was promised to him, and that the son, Altha, did not think such action advisable, and rented it to another. Later, when it was discovered that the father had entered into a contract to sell the land to his son, Altha, this proceeding was brought. In a general way the evidence on the part of the plaintiffs was to the effect: That Mr. Sharon at times seemed forgetful, possessed of an unreasonable feeling against his son, Altha, whom he claimed had caused the death of a mare in working her, and frequently threatened to sue him for its value, and, when the son finally offered to pay for it, the father said to let it go. That the son, Altha, seemed to take the lead in transacting his father's business, buying supplies for him, and paying the bills, and that the wife, before her death, had rendered the same service. That in previous years he had trouble at times with his wife, and would go away for a time and leave her. That he is in recent years some weaker because of his age and previous illness, and does not often go up town. When he wanted money from the bank, he sometimes sent for it by his son or daughter and would sometimes go himself. No instance is given by the witnesses for the plaintiff of any money being wasted or of property being dissipated. Such is not claimed, but it is feared he may do so. This statement in substance covers the testimony of Kistler, a son-in-law, and as a part of his examination he was asked, and over the objection of defendant was permitted to give, his opinion as to the capacity

of Mr. Sharon to transact business, based upon the facts testified to by him. The answer was, "I would say that he was not." The particular inquiry based upon such facts was, "What would you say as to whether or not he is of sufficient sound mind at this time to transact his ordinary business affairs?" The objection to this interrogatory, which was timely, was that the witness was not competent, and the testimony given was not sufficient upon which to base an opinion. The wives of the petitioners, his daughters, complain that he was in some ways unkind to their mother during her lifetime, and that he refused to pay her funeral expenses. It appears, however, that she had an estate of her own in which he shared after her death, and that he insisted the funeral expenses should be met from it. This, among other things, is presented as a peculiar and unnatural action, being one of the circumstances upon which some nonexpert witnesses based the ultimate opinion that he was of unsound mind. It appears that after the death of his wife he caused to be erected at her grave a monument which cost \$240, and that the son, Altha, drew the check in payment for it. There is no suggestion that the father did not know or realize what he was then doing; but, on the contrary, it appears that it was his desire to so do. With this and with but little, if any, other material addition to the facts, the other plaintiff and the wives of the two were asked like questions and over objections permitted to give their opinions. Upon the propounding of the question to one of the witnesses there was a colloquy between court and counsel as to the form of the inquiry, and also as to whether it had sufficient basis in fact. Expressing doubt as to whether it was a proper interrogatory, the court permitted it to be answered, and error is assigned against such rulings.

II. On the part of the defendant, this appellant, the evidence is to the effect that the rent charge for the land represented the full value of its use, and that the contract price for the land was its full value, and this evidence is in no manner contradicted or weakened by other facts in the case. Mr.

Sharon is shown to have given personal attention to his affairs, transacting his business at the bank in the ordinary way, excepting that at times, as some evidence tends to show, he authorized others to sign checks for him and look after the balancing of his bank book. The larger amount of his cash means, less than \$1,000, he left in the bank, carrying interest-bearing certificates of deposit. There is no evidence that in any of his business transactions he has been overreached. His management of his affairs seem to have been with good judgment, and, although he was deficient in education, there is evidence in the record of a considerable degree of shrewdness and care in money transactions. His banker, his physician, the merchant with whom he dealt, his neighbors and acquaintances, all testified that in his methods of business or in his conduct there was nothing to indicate unsoundness of mind affecting his ability to care for his own business and that he was competent to so do. His own testimony as a witness, called by the plaintiffs, gave evidence of a full consciousness of the nature of this proceeding, what he conceived to be its real purpose, and, aside from one instance of forgetfulness as to where certain of his valuable papers had been left, was consistent throughout with the idea of competency and an aggressive purpose to care for his own property.

A careful reading of the entire record renders it quite difficult for one to escape the conclusion that this proceeding is not a wholly disinterested one, but throughout it arises the suggestion that, while the conservation of the appellant's property is the main purpose, such protection is sought not less for others than for the defendant. The array of witnesses appearing for the defendant, his son, two other daughters, whose interest may be admitted, but supported by many others who were disinterested, and whose opportunities for seeing the appellant, observing his conduct and methods, and which were such as to fully warrant the conclusions drawn from them, to our minds presents a weight of evidence far heavier than that in support of the petition, and in the face of which,

so far as appears in the record, we could without any reasonable question hold that petitioners had failed in their case.

III. This discussion of the evidence has bearing upon two questions raised by the appeal. The first is that which we have earlier referred to as alleged error in permitting

nonexpert witnesses to give their opinions upon the facts testified to by them. The rule is settled by many decisions that, before a nonexpert witness may be permitted to testify to

1. EVIDENCE:
mental inca-
pacity: quali-
fication of wit-
ness.

mental unsoundness, he must not only detail the facts and circumstances on which his opinion rests, but these must be such as tend to support or justify his conclusion. *Alvord v. Alvord*, 109 Iowa, 113; *Stutsman v. Sharpless*, 125 Iowa, 340. In the latter case, this court, in discussing that question said: "The facts on which are based an opinion of unsoundness of mind should appear in their natures somewhat inconsistent with mental soundness, as that the acts or talks were irrational or unusual, or such as would not ordinarily be anticipated from a person of his character." Measured by this test—and it is a reasonable and safe one, when prior soundness of mind is not questioned—we think there was wanting in the testimony of nonexpert witnesses the facts necessary to serve as a proper basis for the opinion that the appellant was incompetent to manage his business affairs.

No statement of fact nor recitation of conduct presented a situation unnatural or unusual in the acts of the appellant. The assistance which was at times given him in his business was not different from that received by him from his wife during her lifetime, and at a time when no question is raised as to his competency. His relations to his son were not unnatural, even giving to the testimony concerning the dead horse all that can be claimed for it. The refusal to bear the funeral expenses of his wife, while perhaps different from what most other men might have done under like circumstances, has explanation in the fact that she had a private estate. It had a tendency to show a miserly nature, but

nothing more; and the subsequent purchase of a tombstone for her grave at a cost of \$240, he being possessed of property worth about \$9,000, cannot be classed as an unreasonable act. We are of opinion that, while the fact testimony given by the witnesses of the plaintiffs was competent upon proof of the issues, there was no sufficient basis in it upon which to admit a nonexpert opinion as to appellant's want of capacity, for all the facts were entirely consistent with his manner of life, his habits, his prejudices, and his conduct during the years when his mental capacity was not questioned.

IV. The test in cases of this character is that to warrant the appointment of a guardian there must appear such unsoundness of mind as shows that the party against whom the

2. GUARDIAN-SHIP: mental incapacity: evidence.

proceeding is brought is incompetent to look after and care for his property, and such in effect was given by the trial court in its instructions to the jury. Measured by this test, and excluding from the record the opinions of the nonexpert witnesses, which were no doubt considered of evidential weight in the submission of the cause, there remains in the record no testimony which in our opinion warranted the submission of the cause to the jury, and the motion by appellant for a directed verdict should have been sustained.

The conclusions reached render it unnecessary for us to consider other assignments of error.

Because of the error pointed out, the judgment of the trial court is *Reversed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

J. L. KAMRAR, Appellee, v. J. C. BUTLER, Appellant.

Boundaries: CITY LOTS: WIDTH: EVIDENCE. In this action involving
1 a disputed boundary lot line the evidence is held sufficient to show
that the lots were sixty feet in width as surveyed and platted.

Estoppel: PLEADINGS. To be available the facts constituting an estoppel must be pleaded.

Trial in equity: TRANSFER OF CAUSE: WAIVER. Where the facts pleaded in the petition to enjoin defendant from trespassing or interfering with plaintiff's possession of certain lots clearly entitled him to some form of relief, if true, but defendant claimed that the remedy was at law, his failure to move for a transfer of the cause to the law side of the docket was a waiver of any error in trying the case as an equitable action.

Real property: TRESPASS: INJUNCTION. An injunction will lie to restrain repeated trespass or threatened injury to real property.

Appeal from Hamilton District Court.—HON. R. M. WRIGHT, Judge.

SATURDAY, MARCH 14, 1914.

ACTION in equity to enjoin defendant from trespassing upon and interfering with plaintiff's possession of certain lots in Webster City, Iowa. There was a decree as prayed in the district court, and defendant appeals.—*Affirmed.*

G. D. Thompson, for appellant.

Kamrar & Prince, for appellee.

WEAVER, J.—The plaintiff alleges that he is and for many years has been the owner in fee of lots 5, 6, 11, and 12 in block 13 of Webster City; that, prior to the matters herein complained of, he brought an action against the defendant in the district court of Hamilton county, Iowa, to quiet his title to said property against all adverse claims thereto by said defendant, in which action a final decree was entered confirming plaintiff's claim of ownership to all said property, and quieting in him the title thereto in fee simple. It is further alleged that by the terms of said decree the defendant was ordered to vacate said premises, and that, upon failure to do so, a writ of removal should issue against him, but

plaintiff avers that defendant refuses to obey said decree or the writ issued thereon, but persists in encroaching on said lots by erecting buildings, and by throwing rubbish upon the same, and by interfering with the plaintiff's tenants in their use and enjoyment of the property, all to the irreparable damage of the plaintiff. The prayer for relief is that the plaintiff be enjoined from said trespasses, and from all interference with plaintiff's lawful use and enjoyment of the premises, and that defendant be required to remove all the buildings and rubbish which he has placed thereon. A general demurrer to the petition having been overruled, the defendant answered, admitting the rendition of the decree mentioned in the petition, and pleads the same as an adjudication and estoppel against plaintiff's right to maintain this action. He denies the alleged trespasses, or that he has used or occupied any part of plaintiff's lots, but alleges that he owns the land lying directly east of plaintiff's lots, and that the line between plaintiff's premises and his own has been fixed and established by acquiescence for more than ten years, and that the matters of which plaintiff complains have reference wholly to land lying east of said line and within the bounds of defendant's rightful possession and ownership.

It will be seen from the foregoing that, when divested of all immaterial considerations, the real controversy between the parties turns upon the real location of the boundary line

1. BOUNDARIES : between their respective lots. The testimony
city lots : indicates that the determination of the ques-
width : evi-
dence. tion thus raised depends on the platted width
of the lots in that block, whether sixty-six feet, as claimed by the plaintiff, or fifty-two feet eight inches, as claimed by the defendant. The trial court, after hearing all the evidence offered by the parties, found that the true width of the lots is sixty-six feet, and sustained the contention of plaintiff substantially as set out in his petition. This finding is attacked by the defendant as being without sufficient support in the record. There is nothing to be gained by attempting to set out the tes-

timony in this opinion. It is, to say the least, quite confusing in many respects, but we think it fairly sustains the conclusion announced by the court below. The recorded plat has become so faded and worn that it is now impossible to decipher the figures. Witnesses testify to having seen thereon the figures 5, 2, and 8, and that there was some mark which might have been a decimal point between the 2 and the 8. It is shown, however, that in the instrument of dedication which accompanies the plat the lots of the entire plat are described as being "uniformly sixty-six by one hundred and thirty-two feet," except certain described blocks and lots, among which exceptions block 13 does not appear. This would seem to be quite decisive of the original platting. It finds support also in the plat book of the county where these lots are described as being sixty-six by one hundred and thirty-two feet. The location of these lots appears to be in a portion of the plat which was not occupied and improved in the earlier years of the city's history, and, the marks and monuments of the survey not having been preserved, the usual result of uncertainty and trouble has followed. Appellant complains that the surveys and the oral testimony offered in the endeavor to retrace the true lines of the lots are weak and insufficient evidence. That much of it is of slight value is quite obvious, but, as a whole, it seems to be the best which is obtainable, and we regard it sufficient to justify the decree entered.

The allegation of acquiescence in the line claimed by the defendant is not sustained by any substantial evidence, and the trial court did not err in overruling that defense.

Counsel also argue that, by reason of certain alleged conduct on part of plaintiff at the time which defendant became the owner of the lot on the east, plaintiff is estopped to claim title to the line established by the trial court. Of this it is sufficient to say that no such estoppel is pleaded, nor do we think the evidence referred to would be sufficient to sustain such plea had it been made.

2. ESTOPPEL:
pleadings.

Finally it is said that plaintiff has failed to show any grounds for equitable relief, but we think the point is not well taken. If the matters stated in the plaintiff's petition

are true, they show him clearly entitled to remedy or relief of some kind, and, if defendant believed that the true remedy was at law instead of in equity, he could have moved for a transfer of the issues to the law side of the calendar for trial. Code, section 3432. No such motion was made, and the error if any was waived. Code, section 3437.

That an injunction will issue to restrain repeated trespasses and threatened injury to real property is elementary.

Troe v. Larson, 84 Iowa, 649; *Tantlinger v. Sullivan*, 80 Iowa, 218; *Ladd v. Osborne*, 79 Iowa, 95; *Bolton v. McShane*, 67 Iowa, 208.

There is some conflict in the testimony, and, so far as the merits of the case depend upon any question of veracity of witnesses, we are always disposed to give considerable consideration to the views of the trial court. Moreover, our own reading of the record inclines us to the conclusion that the preponderance of evidence is with the plaintiff on all essential matters of dispute.

It follows that the decree of the district court must be — *Affirmed*.

LADD, C. J., and PRESTON and EVANS, JJ., concur.

JOHN Q. HAYS, Appellant, v. J. T. CLAYPOOL, ET AL., Appellees.

Parentage: EVIDENCE: GENERAL REPUTE. Parol evidence that among
1 the friends and acquaintances of the family the plaintiff, born out of wedlock, was generally reputed to be the son of defendant is admissible on the question of parentage, but not sufficient when standing alone to establish the ultimate fact of parentage.

Judgments: LOST RECORDS: PAROL PROOF. Conceding that a prior
2 adjudication may be proven by parol, where the record has been

lost or is not available, to render such testimony competent it must appear in some legitimate manner that there was such a proceeding at some time and before some court, in which the question involved was considered if not adjudicated.

Parentage: RECOGNITION: EVIDENCE. To establish a parent's recognition of an illegitimate child it must appear that he openly acknowledged his parentage in conversation with friends and associates, whenever there was occasion to refer to the subject, although the recognition need not have been so universal as to be known to all. The evidence in the instant case is insufficient to show recognition.

Appeal from Iowa District Court.—HON. R. P. HOWELL,
Judge.

WEDNESDAY, MARCH 11, 1914.

ACTION for partition of real estate. The defendants contested plaintiff's title to any part or share in the property. Petition dismissed and plaintiff appeals.—*Affirmed.*

J. M. Dower, for appellant.

Stapleton & Stapleton, W. E. Wallace, J. L. Swift, and Wade, Dutcher & Davis, for appellees.

WEAVER, J.—Samuel L. Claypool died intestate in the year 1907, seized of the lands in question. At the time of his death he was a widower. The defendants are children and representatives of children of the said Samuel L. Claypool, and claim to be his only heirs, and therefore entitled to his entire estate. The plaintiff alleges that he is a son of said deceased, born out of wedlock. He further says that he was generally and notoriously recognized by the deceased as his son, and that the fact of such relation was judicially established in a proceeding before one Thompson, a justice of the peace, in Hardin county, Ohio, in the year 1850. It was the opinion of the trial court that the evidence was insufficient to sustain the plaintiff's claim, and the bill was ordered dismissed.

The appeal brings to our review issues of fact only. It is unnecessary, we think, to extend this opinion for any minute review of the testimony. The plaintiff is the son of one Isabel Hays, an unmarried woman, and was born in Hardin county, Ohio, in the year 1850. This action was begun in 1913, some sixty-three years after the plaintiff's birth, when, in the course of nature, most of those who could have spoken with some intelligent and reliable certainty of the circumstances concerning his parentage and childhood have passed away, and the testimony of the few who remain is of necessity clouded by the haze and uncertainty of fading memory.

Enough is developed, perhaps, to justify the conclusion that among the friends and acquaintances of the family Samuel L. Claypool was quite generally reputed to be the plaintiff's

1. PARENTAGE :
evidence : gen-
eral repute. father. That this sort of indirect or hearsay evidence is admissible upon an issue of this nature is quite well established. *Van Horn v. Van Horn*, 107 Iowa, 247; *Alston v. Alston*, 114 Iowa, 29.

But it is nowhere held that mere repute alone is sufficient to establish the ultimate fact of parentage, and, aside from this testimony, plaintiff presents very little competent proof of the truth of his claim. The claim of an adjudication, upon which much stress is laid in pleading and in argument, must be said to have wholly failed.

It may be conceded that, if the record be lost or not available proof of the proceedings, trial and judgment may be made by parol, but, to render such testimony competent, it must be shown in some legitimate manner

2. JUDGMENTS :
lost records :
parol evidence. that there was a proceeding of some kind, at some time, before some court, in which the question of the relation between the plaintiff and his alleged father was a matter of consideration, if not of adjudication. But of these facts there is in this record not a particle of testimony, except the vaguest kind of hearsay, rumor, and

gossip. The theory is that a proceeding of some kind was begun before a justice of the peace, charging Samuel Claypool with being the father of this illegitimate child, and, as a result of the case, Claypool paid Isabel Hays a sum of money, either to discharge a judgment or by way of compromise. But no person testifies to any such fact or facts. The justice of the peace is dead. His docket is not found or produced. No witness ever saw such a docket entry, or any writ, warrant, or process in such a case. No witness was present at the alleged hearing. Indeed, not a witness lays claim to personal knowledge of anything transpiring in or before such justice's court, or of any record of such proceeding, and it can hardly be argued with any seriousness that an issuable fact can be established by such evidence.

The evidence of recognition of plaintiff by Samuel L. Claypool is scarcely less lacking in persuasive force. But two witnesses testify to anything like a direct admission that plaintiff was his son, while two others testify to statements from which such admission may be inferred. The two witnesses first mentioned undertake to speak of transactions and conversations occurring many years before the date of the trial, and there is much in their testimony as a whole which leads the impartial reader to distrust the entire reliability of their memories. But, even if we accept the stories of all these witnesses as literally true, we are not prepared to say the court ought to have held the fact of general and notorious recognition sufficiently established. We have held that, to be such, the recognition need not have been so universal or so general and public as to be known to all. It need not be proclaimed from the house-tops, but, "if in his intercourse with neighbors, associates, and friends he makes no attempt to conceal the relationship he bears to the child, but acknowledges it openly whenever any reference to the subject is made, and this recognition is so often repeated as to evidence his willingness that all who care

3. PARENTAGE:
recognition:
evidence.

to know the truth may understand that he is the father of the child," it is sufficient. *Tout v. Woodin*, 157 Iowa, 518.

In the cited case there were some twenty distinct acts and statements of recognition, with many circumstances of a corroborating character, and we sustained the decree of the trial court establishing the right of the plaintiff to inherit. The case at bar falls far short of the measure of the rule quoted. Samuel L. Claypool lived fifty-seven years after the birth of plaintiff, and, if it be true that in his familiar intercourse with his neighbors, associates, and friends he made no attempt to conceal his alleged relationship with plaintiff, but repeated the recognition so frequently to different people as to evince a willingness that all who cared might know the truth of the matter, it is inconceivable that the diligence which we may assume has been exercised by plaintiff and his counsel in searching into the personal history of the alleged parent for this long period of more than half a century should have developed but four persons to whom any such declarations were ever made. So far as the record shows, this alleged father and son never visited each other, nor did any letter or any other communication or token of remembrance pass between them, though both lived to be old men, and, taking all the circumstances together, we are of the opinion that to hold that a "general and notorious" recognition has been established as required by Code, section 3385, would work a practical elimination of those words from the statute.

There is no occasion, we think, for a more protracted discussion of the testimony. If the conclusions we have announced are correct, and we see no way to escape them, the plaintiff must be held to have failed to make a case. He has labored under a serious handicap in having to seek his evidence largely from sources which the lapse of time have rendered unfruitful and uncertain, and his showing, even when aided

by the most liberal construction of the rules of evidence, is insufficient to justify the relief demanded.

The decree of the district court is, therefore *Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concur.

POLK COUNTY, Plaintiff and Appellant, v. ZELL G. ROE, C. S. KINGMAN, and I. H. KINGMAN, Defendants and Appellees, and POLK COUNTY, Plaintiff and Appellant, v. F. A. COPE, ET AL., Appellees.

Public officers: FEES: LIMITATION OF ACTION. An action upon the official bond of a justice of the peace to recover fees retained by him in excess of the lawful amount is barred after three years, under the statute prescribing a three-year limitation upon actions against public officers of that character.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

WEDNESDAY, MARCH 11, 1914.

BOTH of the above-entitled actions involve the same questions. Both cases will therefore be disposed of by one opinion. Each is an action on the official bond of a justice of the peace; the principal defendants being Zell G. Roe and F. A. Cope, respectively. In each case there was a demurrer to the petition; the principal ground of the demurrer being that the action was barred by the statute of limitations. The demurrer in each case was sustained upon this ground, and the plaintiff has appealed.—*Affirmed*.

Thomas J. Guthrie, John J. Halloran, and W. S. Ayres, for appellant.

Parsons & Mills, for appellees.

EVANS, J.—We will consider the cases separately, and in the order in which they appear upon our docket. The first is an action upon the official bond of Zell G. Roe, as justice of the peace for Des Moines township in Polk county. His term of office began January 1, 1907, and ended January 1, 1909. The civil fees collected by him during those two years amounted to \$1,278, which amount has at all times been retained by him. By resolution of the board of supervisors he was allowed to retain the sum of \$500 per year, or a total of \$1,000. This was the maximum allowance permitted by the statute. Section 4600-a, Code Supplement. This action was brought to recover the balance of \$278, and was begun on August 28, 1912. Section 3447 of the Code provides that an action against a public officer growing out of a liability incurred by the doing of an act in an official capacity, or by the omission of an official duty, including the nonpayment of money collected upon execution, must be brought within three years after the cause of action accrues. Appellant concedes that the case is governed by this provision of the statute. There is no room for difference of opinion at this point. *State v. Dyer*, 17 Iowa, 223; *State v. Henderson*, 40 Iowa, 242; *Keokuk County v. Howard*, 41 Iowa, 11; *Lower v. Miller*, 66 Iowa, 408.

The contention of the appellant is that the cause of action against the defendant did not accrue until July 3, 1912, because the board of supervisors had not prior to such date made any allowance to the defendant as to the amount of fees which might be retained by him. The contention is not sound.

Under section 1301 of the Code it was the duty of the defendant as justice of the peace to make report under oath to the board of supervisors showing the amount of fees collected by him, "together with vouchers for the payment of all sums collected to the proper officer." Under this statute there was due from the defendant a report on the first Monday of January of the year 1908, and likewise on the first

Monday of January, 1909. He made no report on either date, nor at any time during such years. He was therefore clearly guilty of a violation of the statute, and a cause of action upon his official bond accrued forthwith. The same statute requires that vouchers from the proper officer for the payment of the sums collected should be filed with the report. This means that it was his duty to have paid to the county treasurer the fees thus collected prior to the time of presenting the report. A failure of the board of supervisors to make an allowance of the amount which he might retain could not justify any withholding on his part of the fees collected or of the report due. In the absence of an allowance by the board of supervisors, the justice was bound to pay over all the fees and report the same accordingly. In this case the maximum amount which could have been allowed him was \$500 for each year as already indicated. On any theory, therefore, he was in default for the balance. Such balance is all that is claimed by the plaintiff. The statute of limitations, therefore, had fully run at the expiration of three years after the first Monday in January, 1909. This was the ruling of the trial court, and its order in that respect is affirmed.

II. The defendant Cope was a justice of the peace for the same township and for the same period of time. The civil fees collected by him amounted to \$1,610.75. This action is brought to recover the balance of \$610.75; the board of supervisors having allowed to this defendant, also, the maximum amount of \$1,000. In all other respects the facts are like those in the preceding case. What we have said therefore in the foregoing paragraph is decisive of this case also.

The order of the trial court in each case will therefore be *Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

In the Matter of the ESTATE OF CHARLES BAKER, deceased.
On Hearing of Objections to Final Report of Executors.
I. W. BAKER, Beneficiary and Objector, Appellant.

Estates of decedents: HOMESTEAD: OCCUPANCY BY WIDOW: PAY-
1 **MENT OF RENT.** Upon the death of the husband the wife may continue to occupy the homestead until it is otherwise disposed of by law, and she is not required to pay rent during the time thus occupied and prior to an election to take a distributive share in the estate.

Evidence: TRANSACTIONS WITH A DECEDENT. A widow claiming that
2 her husband assigned a lease to her prior to his death covering part of his property is competent to testify to the genuineness of his signature and to her possession of the instrument before his death. Evidence held sufficient to show an assignment of the lease in question.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

WEDNESDAY, MARCH 11, 1914.

THE controversy involved in this case arises upon exceptions to the final report of executors. There was trial to the court sitting in probate. After hearing, the exceptions were overruled, and the report approved. The objector, I. W. Baker, has appealed.—*Affirmed.*

Guy S. Calkins, for appellant.

Henry G. Walker, for appellees, executors.

EVANS, J.—The decedent, Charles Baker, died testate on July 1, 1910. This will was admitted to probate on Sep-
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tember 12, 1910. The decedent left surviving him his widow, Minnie H., and four sons by a former marriage. In pursuance of their nomination in the will, the widow and the son, R. N. Baker, were appointed executors. Twenty-two months later the executors filed their final report. The objections to this report were made by one of the sons, I. W. Baker, appellant herein. The report of the executors was objected to in two respects: (1) Because the executors had rendered no account for the rent of the homestead during the intervening period, twenty-two months; (2) because the executors failed to account for twelve months rent on certain other real property.

It is undisputed that the decedent left a homestead and two other pieces of realty located in Iowa City, and that each of such pieces of realty, including the homestead, had a rental value of \$30 per month. The two pieces of realty other than the homestead were actually rented at such a rate. By the terms of the will the widow became entitled to the household goods and library, and one-third of the estate, which was to include the homestead. The rest of the estate was to be "divided into four equal sums," etc., for the purpose of division among the sons. The widow did not make her election to take under the will until the filing of the report of the executors, when such election was made in due form. For the intervening twenty-two months she had occupied the homestead.

By the first objection above referred to, it is sought to charge her with rent for the use of such homestead. It is argued that, inasmuch as she took a third of the estate, she

should be charged with the rental value of the
1. ESTATES OF DE- CEDENTS: home- the homestead while it was occupied by her.
stead: occu-
pancy by wid-
ow: payment
of rent. The trouble with this argument is that it
wholly ignores the statute on the subject.

Section 2985 provides that "upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according

to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated."

- The occupancy of the homestead by the widow in this case was in strict accord with this statute. It was in accord also with our previous decisions. *Burdick v. Kent*, 52 Iowa, 583; *Mahaffy v. Mahaffy*, 63 Iowa, 55; *Fehd v. City of Oskaloosa*, 139 Iowa, 621.

In the *Mahaffy* case, *supra*, it was said: "The right of the wife to continue in possession and occupancy of the homestead, after the death of the husband, is not a right or interest in his estate which she takes by inheritance, but is entirely distinct from the interests which she takes by virtue of that right. It is a mere personal right to occupy and possess the premises, but is unaccompanied by any title or property interest therein. It does not accrue with the death of the husband, nor is it enlarged or otherwise affected by that event. She had the right to the same extent during his life and the statute . . . simply continues it after his death." It is true she could have been required to elect at an earlier date, but such a requirement was not made by any of the parties in interest. We hold therefore that the widow is not chargeable with rent for the occupancy of the homestead prior to her election.

II. As to the other items specified in the objections, the contention for the executors was and is that shortly before he died, the decedent caused a written lease for one year to

2. EVIDENCE:
transactions
with a decedent.
- be signed by himself as lessor and one Rigler as lessee of one of the pieces of realty, at \$30 per month, and that he thereupon assigned to his wife, in writing, said lease and the rent to accrue, amounting to \$360. For such reason, no account was made in the executors' report for such rent. In support of this contention, the widow produced the lease, with a purported assignment duly executed on the back thereof by the decedent. She testified, over the objections of the objector, that she was ac-

quainted with her husband's signature, and that the signature there appearing was her husband's signature. She further testified that she had been in possession of such lease and such assignment from a time prior to the death of the decedent. Some other matters were also testified to by her in the same connection, which were ruled out by the trial court as being forbidden by the provisions of section 4604 of the Code. It is now urged by appellant that the evidence permitted to stand was also in violation of such section, and that, in any event, it was insufficient to sustain a finding of the signing or the delivery of the assignment in question by the decedent to his wife. We think it was clearly competent for the widow to testify to her opinion of the genuineness of the signature of her deceased husband upon a showing of her previous familiarity therewith. We think it was equally competent for her to testify to her own possession of the instrument before the death of her husband. Whether these two circumstances were sufficient to sustain a finding by inference that the same was delivered to her by her husband, we have no need to decide, because of the cross-examination of the witness, which was as follows: "Q. Whose handwriting is this in, Mrs. Baker? A. That is mine. Q. Whose handwriting is this on the back of this Exhibit A—of executor's Exhibit A? A. That is mine. Q. You say this was in the morning that he delivered this to you? A. Yes, sir; in the forenoon. Q. On the Tuesday preceding his death on Friday? A. Yes, sir. Q. Handed it to you with his own hand? A. Yes, sir. Q. Did he sign this in your presence? A. He did. Q. He was in bed at that time? A. He was. Q. Weak? He was able to write his name sitting up? A. Well, he did it. I don't know how else to tell you. Q. How long had he been in bed directly prior to that night? A. Over night. He went to bed about 10 o'clock the night before. Q. Did you hold or guide the pen as he signed? A. I did not."

This examination went beyond the examination in chief, and fully supplied all that was lacking therein. The evi-

dence was wholly undisputed. The trial court properly sustained the report of the executors at this point also, and its order is therefore—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

R. M. BEAMER and H. A. BAUMAN, v. CHARLES STUBER,
Appellant.

Brokers: ACTION FOR COMMISSION: PERFORMANCE OF CONTRACT. An
1 agent performs his contract to procure a purchaser of land when he produces a buyer ready, able and willing to purchase on the terms proposed, or which are acceptable to the owner. To entitle him to his commission the offer need not be made directly by the purchaser to the owner; it will be sufficient if made under such circumstances that the seller may be required to execute a binding contract. Thus where the purchaser was within calling distance when the agent communicated to the owner the offer of the purchaser, who was ready and willing to reduce the offer to writing if desired, the contract of agency was sufficiently performed to entitle the agent to his compensation.

Same: SUBSEQUENT WRONGFUL ACT OF OWNER: EVIDENCE. Where the
2 agent found a purchaser ready, able and willing to purchase on the terms proposed by the owner, the subsequent act of the owner in conveying the property to another would not affect his right to his commission. In the present case the evidence is held insufficient to show that defendant made a pretended sale to another and through him to a purchaser procured by plaintiff, for the purpose of defeating his commission.

Same: EVIDENCE. It is incumbent upon a real estate broker when
3 suing for a commission to show that the purchaser produced by him was willing to enter into a binding contract on the terms proposed, and the testimony of the proposed purchaser to that effect is competent.

Same: EVIDENCE: PREJUDICE. In this action for commissions for pro-
4 curing a purchaser, in which plaintiff contended that defendant made an intermediate sale to another party for the purpose of defeating his right to commissions, the evidence of the attorney who prepared the contract of sale that in securing the assent of

the purchaser to a substitution of the intermediate purchaser as seller, instead of the owner, he explained that it was done to avoid the payment of two commissions, was inadmissible; and in view of the fact the attorney was an unbiased witness its admission was not only erroneous but extremely prejudicial as well.

Same. In an action for commission for the sale of land it is competent to show why the sale to the proposed purchaser was not consummated.

Appeal from Wapello District Court.—HONS. FRANK W. EICHELBERGER and FRANCIS M. HUNTER, Judges.

WEDNESDAY, MARCH 11, 1914.

ACTION for commission alleged to have been earned in finding a purchaser for land. From judgment as prayed, the defendant appeals.—*Reversed.*

Tisdale & Heindel, for appellant.

Jaques & Jaques, for appellees.

LADD, C. J.—The farm contained two hundred and forty acres, and lay three and one-half or four miles from Eddyville. The owner, Charles Stuber, had listed it for sale with several agents, among whom were R. G. Beamer and Warner & Hawkins. Beamer had a working arrangement with H. A. Bauman, who resided at Pella, whereby commissions earned in producing purchasers found by him should be divided. Warner & Hawkins had a similar arrangement with James Jelsma, of Pella. On July 28, 1909, Garrett and Henry Van Zante, at the instance of Bauman, went out with Beamer to look at Stuber's farm and others. Henry Van Roekel had examined the farm twice under like auspices, and, with his wife, looked it over again on that day. Owing to his relationship to Van Roekel (the latter's wife being an aunt of Van Zante's wife), Garrett Van Zante refused to buy, but said to

Beamer that he would purchase the farm at the price named if Van Roekel did not take it. Thereupon, according to Beamer, he left his team in the highway with the Van Zantes, and went over into a hayfield about one hundred and fifty or two hundred yards distant, where Stuber was at work, and informed him that his farm was sold, that, if Van Roekel did not take it, Van Zante would purchase it at the price listed, and Stuber assented thereto. Beamer's testimony, save as to the "conversation had with Stuber," was corroborated by that of Garrett Van Zante, and his statement that Stuber had said he had given Van Roekel a few days' option was somewhat confirmed by Van Roekel's testimony that such an option had been given him. On the other hand, Stuber denied having given any option to Van Roekel, or having stated he had done so to Beamer, and, though saying that before he went to the hayfield Beamer had stated that Van Zante had a notion to buy the farm if Van Roekel did not, and his brother liked it, denied that Beamer had come over from the highway to talk with him in the hayfield, or that any conversation of the kind related by Beamer ever took place. In this, he was corroborated by the testimony of a neighbor who was helping him haul hay. The jury, notwithstanding this conflict, might have found that Stuber had granted Van Roekel a few days' option, and that Van Zante had agreed to buy the land if Van Roekel did not, that Beamer so informed Stuber, and the latter assented thereto. If so, would this constitute the finding of a purchaser?

This duty is performed when the agent finds and introduces to his principal a person who is ready, able, and willing to buy on the terms proposed by or acceptable to said principal.

1. **BROKERS:** action for commission; performance of contract.
2. Clark & Skyles on Agency, section 771. In speaking on this subject, in *Johnson v. Wright*, 124 Iowa, 61, we said: "The agency was to find a purchaser on certain terms, and, in order to earn the commission, it was incumbent upon plaintiff to furnish a person ready, able, and willing

to buy on the terms fixed. To accomplish this, where no sale is actually made, either a valid obligation to buy must be procured and tendered to the principal, or the vendor and proposed purchaser must be brought together, so that the vendor may secure such a contract if he wishes to do so. It is not enough that a parol offer to buy be made to the agent. The proposition should be to the principal, to the end that the statute of frauds may be obviated by reducing the agreement to writing." See *Flynn v. Jordal*, 124 Iowa, 457; *McDermott v. Mahoney*, 139 Iowa, 292; *Nagl v. Small*, 159 Iowa, 387.

This does not necessarily mean that the offer shall be made in person by the purchaser to the seller, but that it shall be made in such circumstances that the latter may then exact the execution of a binding contract if he so elects. There is no reason why the agent of the seller may not communicate to him an offer of purchase, and, if the proposed purchaser is immediately accessible so that a written contract then and there may be executed, and he is ready, willing, and able to consummate the deal, this is enough. The agent is not in a situation to insist that the agreement be oral or in writing. In either event, if entered into, and the proposed purchaser is ready, able, and willing to perform, the agent has earned his commission. To entitle him to recover, then, the *onus* is not upon the agent to prove that the proposed purchaser offered to enter into a written agreement. It is enough if he show that an oral proposition was accepted, without such requirement on the part of the vendor. Here Van Zante was within hailing distance when Beamer had the talk with defendant in the hayfield. Had the latter required that the agreement be reduced to writing, Van Zante was ready and willing to have done so. Though the agreement of sale was conditioned upon Van Roekel taking the land if he could arrange to raise the money, this was necessarily imposed by defendant's conduct in granting the option; but, as such an oral option was not enforceable, and the sale to Van Roekel was not effected, and he did signify to defendant or his agent that he would buy,

the agreement with Van Zante through Beamer cannot be said to have been uncertain. If, then, the facts were as contended by plaintiffs, a purchaser was found by them, and the commission earned. But, if there was no such option, Van Zante could not have insisted upon buying on the condition, nor was defendant bound to accept him as a purchaser on this condition, unless he so elected.

II. Another issue was whether a pretended sale was made by defendant to Hankins, and through him to Garrett and

2. SAME: subsequent wrongful act of owner: evidence. H. D. Van Zante, for the purpose of defrauding plaintiffs of the commission earned by finding a purchaser for the land. To explain this, a further recital of the evidence is necessary.

On the day after Van Zante visited the farm William Hankins contracted to pay \$19,600 for it, the list price having been \$20,400, and paid \$1,000 down. Thereupon Hankins telephoned to Jelsma, as both testified, that, as he had purchased the farm, it was withdrawn from the market. After some parley, it was finally arranged that, as Jelsma had shown it several times, he might find a purchaser at the list price. Shortly thereafter Jelsma negotiated a sale at that price to Van Zante and his brother. Was this brought about through a fraudulent combination to deprive plaintiffs of the commission earned? It might well have been found from the evidence that Jelsma, who returned to Pella on the same train as did the Van Zantes and Van Roekel and wife in the evening of the day they looked at the land, ascertained that Van Zante had determined to make the purchase, and possibly it might have been inferred that Hankins was advised of this, and that the latter contracted for the land with the design of reaping a profit, rather than allow the commission to go to plaintiffs; but there was no evidence justifying the conclusion that the defendant, Stuber, was connected with this scheme. True, Hankins induced him to sell for \$400 less than he was asking, and then to throw off a like amount as commission he would have had to pay if sold through an agent;

but this alone does not indicate any improper motive. The evidence is conclusive that no agreement to share the difference was entered into, and, when a contract of sale to the Van Zantes was presented, he promptly declined to sign, for that he had sold to Hankins, and the contract was changed accordingly. There was evidence that one Fisk had offered defendant \$20,000 for the farm some time before. Of course this tended to show that defendant was taking less from Hankins than he could have from Fisk; but the land had been on the market for some time, and the fact that the price was reduced upon the certainty of a completed sale is not sufficient to justify a jury in finding that in so selling the owner acted for the fraudulent purpose of cheating another out of a commission. Moreover, it could not well have had that effect for, if a purchaser had been found in Van Zante, any subsequent action on the part of defendant could not defeat the claim of plaintiffs to a commission. The subsequent sale was negotiated by Jelsma, not by these plaintiffs, and there was no ground for submitting to the jury whether plaintiffs found H. D. and Garrett Van Zante as purchasers at the sale effected by Hankins. Because of the request of defendant that the issues of fraud, and whether plaintiffs had found the purchasers from Hankins, be submitted to the jury, it was not reversible error to have done so. As the propriety of doing so has been challenged and fully argued, we have thought, in view of another trial, that we should pass on the questions.

III. Garrett Van Zante was permitted to testify over objection that, when saying he would buy the land if Van Roekel did not, he was willing at that time to enter into a written contract so conditioned. The ruling

3. SAME: evidence.

was correct. It was incumbent upon plaintiffs to show that the purchaser produced was ready, able, and willing to buy, and, to do this, he must have been ready to have entered into a binding contract, had the seller so required. The ruling was correct.

IV. Van der Ploeg, an attorney, prepared the contract,

and, when it was returned, took it to Van Zante in order to have him assent to the change in substituting Hankins as seller, instead of Stuber, and he thereupon explained that they had changed it "to avoid two commissions out of it, so the other fellows couldn't go in for the commission." This was testified to over objection, and the motion to strike out was overruled. How Van der Ploeg obtained any such information is not disclosed. Jelsma and Van Zante had agreed that he should draw the contract, and, aside from doing that work, he does not appear to have been employed by either party. The statement, coming as it did from an attorney at law who had prepared the papers, and apparently indifferent as between the parties attributing motives such as charged by plaintiffs, and necessarily casting suspicion on the good faith of defendant in refusing to sign the contract, on the ground that he had sold the land to Hankins, was extremely prejudicial. What the statement was based on does not appear, though the natural inference would be that it rested on information he had received from the parties thereto. What he said was likely to be given much weight by the jury, and the ruling must be regarded as not only erroneous but prejudicial.

4. **SAME: evidence: prejudice.**

V. Several other errors are assigned; but, as these pertain to the issues of fraud, and whether plaintiffs found purchasers for the land from Hankins, they require no consideration. Evidence was admissible tending to show why the proposed sale to Garrett Van Zante, if any there was, fell through; but the plaintiffs must necessarily rely on having found him as a purchaser, and this was true even though enough were shown to have justified the submission of the issue of fraud to the jury. The judgment is reversed, solely because of the error in admitting the testimony of Van der Ploeg, for the other errors assigned were obviated by the requests of appellant.—*Reversed.*

5. **SAME.**

All the Justices concur.

MINERVA FOUNTAIN, Appellee, v. CITY OF DES MOINES,
Appellant.

Municipal corporations: DEFECTIVE STREETS: NEGLIGENCE: EVIDENCE.

1 In this action for personal injury caused by an alleged defective street, evidence that the carriage in which plaintiff was riding tipped over when the wheels were driven into a ditch in the middle of the street, was sufficient to take the issue of negligence on the part of the city in permitting the existence of the ditch to the jury.

Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE. The mere fact that

2 the driver of a carriage knew of a ditch in the middle of the street, into which he drove the wheels of the carriage when it was dark, causing the carriage to overturn and injure plaintiff, will not establish contributory negligence as a matter of law. The question of the contributory negligence of plaintiff's husband in thus driving into the ditch was properly submitted to the jury.

Appeal from Polk District Court.—HON. JAMES P. HEWITT,
Judge.

SATURDAY, MARCH 14, 1914.

ACTION for damages for personal injuries received in an accident upon one of the streets of the defendant, and caused, as alleged, by reason of an obstruction negligently permitted by the defendant. The obstruction consisted of a ditch and an embankment. There was a verdict for the plaintiff, and a judgment entered thereon. The defendant appeals.—*Affirmed.*

R. O. Brennan, H. W. Byers, and Eskil C. Carlson, for appellant.

Clifford V. Cox and Robt. J. Bannister, for appellee.

EVANS, J.—The appellant presents but one question for our consideration: Was the evidence sufficient to warrant submission to the jury? The contention of appellant is that no negligence was shown on the part of the defendant, and that contributory negligence was conclusively shown as against the plaintiff and her husband, who was driving the vehicle from which the plaintiff was thrown.

The accident in question occurred at about 8 o'clock on the night of October 22, 1910. It occurred upon East Twenty-second street near the north line of intersection of such street

and Des Moines street. The first is a north and south street, and the second an east and west street. Neither street was paved; but

1. MUNICIPAL CORPORATIONS: defective streets: negligence: evidence.

both streets were in use. There was some grading done at their intersection. There was some grading also upon other parts of East Twenty-second street. Near the center line of Twenty-second street, and perhaps a little east thereof there was a shallow ditch described by the witnesses as having the appearance of a former "dead furrow." The south end of this ditch was a few feet south of the north line of the intersection of the two streets, and the same extended north along Twenty-second street for a short distance. It was four or five inches deep at its south end, and grew slightly deeper as it extended north, reaching a depth of six inches. It was about two and one-half feet wide. On the west side of it, however, at one place, there was an embankment thrown up so that the difference of elevation between the top of the embankment and the bottom of the ditch was two feet or more. The travel over the street passed on either side of the ditch. On the night in question the plaintiff was riding, in company with her husband and her two children, in a two-seated surrey. The husband was driving. The plaintiff was riding upon the back seat, with a sleeping child upon her lap. They were returning home from "down town," and going north and east. The night was dark. There were no lights in the vicinity. As

they turned north, the husband failed to avoid the ditch. He drove unintentionally so that the right wheels of the surrey came into the ditch and the left wheels upon the embankment. This resulted in the tipping over of the surrey, and the throwing of the occupants to the ground, whereby the plaintiff was injured. The husband had been familiar with this street and the ditch thereon for more than four years, and had driven thereon almost daily with the same horse. Mrs. Fountain had also passed over the street many times in company with her husband, but had never observed the existence of the ditch. The foregoing is a sufficient statement to justify the submission of the question of the defendant's negligence. This feature of the case is not dwelt upon in the appellant's argument. It is sufficient to say that the question of defendant's negligence was clearly a jury question.

The principal emphasis of appellant's argument is devoted to the claim of contributory negligence on the part of the plaintiff and on the part of her husband. Appellant's brief sets out the following testimony of the plaintiff in support of its contention:

Mr. Fountain was driving; I was sitting in the back seat, and Blanche was with me; Orville was in the front seat with Mr. Fountain. We were in a two-seated surrey, with no top; there was no light burning at Twenty-Second and Des Moines streets, and there was no light at Twenty-Second and Lyon, the next street north. If there was any moonlight there wasn't enough to make it light. If I can remember rightly it seems to me just as we got home the moon came up in sight. It was dark as we drove across Grand avenue just before we upset. We turned on Twenty-Second street and went down a little west and got into the ditch and tipped the buggy over, and we all fell out, spilt the groceries and everything out we had in the buggy. I fell out the right side; that was the east side. When we were riding just before the accident I was sitting on the left-hand side; Blanche was on the right; I had my limbs crossed to raise her head; she was asleep. I had my limbs crossed to

2. SAME: contrib-
utory negli-
gence: evidence.

raise her head up a little, so her head would not be lower than her body. Her head was resting on my lap.

Cross-examination:

I don't remember whether we were down town the Saturday night before the accident or not; if it was a nice evening I expect we were; we most always came down Saturday afternoon or evening. I don't remember about that evening; but it was our habit to come down every Saturday evening when the weather was nice. I think October that year was nice nearly all month; I don't think, however, we were down the same week; I did not go down town very often during the week. I don't know just how many times we had passed this place in the two years we had this horse; it was probably three or four times a month; I expect that many times, anyway. When we came to town I came with my husband in the surrey and the same horse, and nearly always this same route. We would go from our house west on Maple street to Twenty-Second, and then would turn south until we were at the turn at Des Moines street, and then, instead of turning into Des Moines street, we would go diagonally across an open half block, and then on Twenty-First street and down Grand avenue into town. In the summertime, in nice weather, we went down town every Saturday evening. There were no lights there any of the nights that we drove by, either on the corner nor on Twenty-Second street. The only lights were the lights from the windows of the houses from along the way in this neighborhood. About five months after I was injured is the first time I ever noticed this ditch in Twenty-Second street. It was about the last of March, 1911. I paid very little attention to the street or anything about the street or the character of the ground over which we were driving when we took these trips to town. I relied upon my husband to look after the road and see where he was going. On the night of the injury it was some time between 5:30 and 6:00 o'clock, I think, when we drove to town. I don't remember how fast we drove that night; I don't think we were driving very fast along Twenty-First street, because it was dark. It did not seem to me we were going fast; we were not in any particular hurry at all. There was nothing about the weather that was alarming, or to hurry us in any way; there was

nothing along the road that created any disturbance. The horse was perfectly gentle. He had never shown any disposition to run away or shy or run or kick or get scared at anything at all. There was nothing that I know of to prevent Mr. Fountain from having complete control of the horse. I cannot think of anything to affect either his judgment or power to guide the horse. There was nothing to distract his attention, or interfere with him in any way; I remember that quite distinctly. I relied entirely upon him to exercise the necessary care in driving the horse and looking out for bad places in the road; I thought that was a pretty smooth street along there, because I never noticed that ditch there and that diagonal street, and there was nothing there. I never noticed anything between our home and town that was not all right. I never paid any attention to the driving; I could have seen the ditch in the daytime, if it was light, if I had looked. If I had paid any attention to where we were going that evening when we were coming in, I would have seen all about this ditch. I may have seen there were no lights and no place for lights anywhere around there. I never paid any attention as to whether there were any lights there or not. The first time I saw the ditch was in March after the accident. Mr. Fountain wanted me to see that ditch, so we stopped on Grand avenue right in the middle of Twenty-Second street, where we could look right straight down the middle of the street, and it was right in front of us. It seemed to be right in the center. The ditch was perfectly plain, so, if any one was driving and noticing and paying any attention, they could see it. I never looked at the streets; I never did the driving, and I never wanted to. I relied absolutely on my husband. It was in the daytime, and I could see it plainly for at least a block or so by looking up Twenty-Second street. There was no obstruction of any kind that prevented anybody from seeing it that looked. The first time I realized that we were at the road was when we got into that rough place we started to go over; it seems the wheels went up on that dirt that was thrown up, and the front wheel got down in the ditch, and we started to go over before I noticed we was out of the track. We tipped pretty soon after we hit the ditch. Of course we could not tell until the other wheel got into the ditch, the back wheel got in. I noticed it as soon as the front wheel got off; we did not tip over until the back wheel got in; I did not see it; I just felt the rig

go over. I felt something wrong the minute the first wheel got into the ditch. I don't remember passing over anything rough until the wheel dropped down.

We are not prepared to say that the foregoing discloses any evidence of contributory negligence. It is enough to say that it does not show contributory negligence as a matter of law. The question was submitted to the jury, and no complaint is made as to the form of the instruction.

Much stress is laid upon the alleged negligence of the husband. It is urged that he knew the condition of the street, and knew the danger presented thereby. It has been held repeatedly by this court that mere knowledge of the defective condition of the street would not charge the husband with negligence as a matter of law. It still remained a question for the jury whether as a reasonably prudent man he believed he could pass the defective place in safety. *Neeley v. Mapleton*, 139 Iowa, 582; *Cook v. Hedrick*, 135 Iowa, 23; *Robertson v. Waukon*, 155 Iowa, 260; *Jackson v. Grinnell*, 144 Iowa, 232; *Hollingsworth v. Ft. Dodge*, 125 Iowa, 627; *Harvey v. Clarinda*, 111 Iowa, 528; *Graham v. Oxford*, 105 Iowa, 705; *Crandall v. Dubuque*, 136 Iowa, 663. The evidence in the case clearly brings it within the rule announced in the above-cited cases.

It is argued by appellee that, even if the husband were negligent, such negligence could not be imputed to the plaintiff. This question does not arise upon this record, because the trial court submitted the case to the jury upon the theory that the negligence of the husband might be imputed to the plaintiff. Whether right or wrong, this instruction furnishes no ground of complaint to the appellant, and no complaint is urged at this point. On the general question of imputed negligence, see *Nesbit v. Garner*, 75 Iowa, 315; *Larkin v. Railway Co.*, 85 Iowa, 504; *Bailey v. Centerville*, 115 Iowa, 271; *McBride v. Des Moines City Ry. Co.*, 134 Iowa, 398. We are

clear in our opinion that the evidence was such as to require submission to the jury.

The judgment below is therefore—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

JOHN MCALLISTER, Appellant, v. EDWARD V. CAMPBELL,
Appellee.

Intoxicating liquors: SALE BY DRUGGIST: REQUESTS: ATTESTATION.

The statute requires that a registered pharmacist before selling or delivering any intoxicating liquors shall take a written request therefor, which shall be attested by him; and omission to attest such request will render the sale illegal and the business may be enjoined as a nuisance, regardless of the question of good faith.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

SATURDAY, MARCH 14, 1914.

SUIT in equity to enjoin a liquor nuisance. There was a decree dismissing the petition, and the plaintiff appeals.—*Reversed*.

M. S. Odle, for appellant.

Heald & Lockwood, for appellee.

EVANS, J.—The defendant was a pharmacist and permit holder, and engaged in operating a drug store at Center Point, Linn county, Iowa. The contention of plaintiff is that the defendant was guilty of violating the provisions of section 2394 of the Code, which is as follows:

Before selling or delivering any intoxicating liquors to any person, a request must be signed by the applicant, in his

true name, truly dated, stating the applicant is not a minor, his residence, for whom and whose use the liquor is required, and his true name and residence, and, where numbered, by street and number if in a city, the amount and kind required, the actual purpose for which the request is made, and for what use desired, and that neither the applicant nor the person for whose use requested habitually uses intoxicating liquors as a beverage, and attested by the permit holder who receives and fills the request. The request shall be refused unless the permit holder has reason to believe the statement to be true, and in no case granted unless the permit holder filling it personally knows the person applying is not a minor, intoxicated, nor in the habit of using intoxicating liquors as a beverage; or, if the applicant is not so personally known, before filling the order or delivering the liquor, he shall require identification, and the statement in writing of a reliable and trustworthy person, of good character and habits, known personally to him, that the applicant is not a minor, nor in the habit of using intoxicating liquors as a beverage, and is worthy of credit as to the truthfulness of the statements in the application; and this statement so made shall be signed by the witness in his own name, stating his residence correctly.

The alleged violation of the statute by the defendant consists largely of defects of form in the requests by purchaser. Seven of these requests were introduced in the record known as Exhibits 1, 2, 3, 4, 6, 7, 8. Defects are pointed out in each of the foregoing exhibits. Some of these defects are slight and formal, and the objections based thereon are exceedingly technical. As to some of these we would be slow to hold that they violate express requirements of the statute, although the attempted compliance has resulted in an awkward and imperfect form. One defect, however, is pointed out in Exhibits 2 and 8 which seems to be quite decisive, and we will confine our attention thereto.

These applications (Exhibits 2 and 8) were not "attested by the permit holder." Such attesting is an express requirement of section 2394. It was wholly omitted. It is true that there was no bad faith apparent in the omission. The defend-

ant confessedly made all sales of intoxicating liquors in person, and made none through any clerk. The application was regularly returned to the auditor as a sale by the defendant, and was presented to the auditor for his attestation. But the violation of the statute cannot be made to turn upon a question of good faith. An active duty is required of the permit holder in each case, and it must be performed in fact before he can lawfully make the sale. To hold otherwise would be to destroy the practical working of the statute.

Section 2397 requires that the returns of the permit holder to the county auditor shall be made under oath, and that such oath shall state that the applications presented were "attested at the date shown hereon." The oath of the defendant, therefore, in the present instance was necessarily false. We see no escape, therefore, from the conclusion that there was a failure at this point to meet the express requirement of the statute.

On this ground the judgment entered below must be reversed, and it is so ordered.—*Reversed.*

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

JOHN E. WATERHOUSE, Appellee, v. CITY OF WATERLOO,
Appellant.

Municipal corporations: DEFECTIVE STREETS: PERSONAL INJURY: PROXIMATE CAUSE. Plaintiff was injured by being thrown from his motorcycle upon striking some obstruction in the street pavement, and the evidence is held sufficient to require submission of the question of proximate cause, and to sustain a finding that a pipe protruding from the pavement was the proximate cause of plaintiff's injury.

Appeal from Black Hawk District Court.—HON. CHARLES E. RANSIER, Judge.

SATURDAY, MARCH 14, 1914.

ACTION for personal injuries resulting from alleged defects in one of the streets of the defendant city. There was a verdict and judgment for the plaintiff, and the defendant appeals.—*Affirmed.*

James I. Kenyon and Williams & Clark, for appellant.

Loren N. Risk and Edwards & Longley, for appellee.

EVANS, J.—The only question presented for our consideration is whether there was sufficient evidence as to the proximate cause of the injury to sustain the verdict. The accident happened on the intersection of Lane street and Independence avenue. Independence avenue, including the intersection, was paved. The plaintiff approached the intersection along Lane street from the north, riding upon a motorcycle. Lane street was not paved, but was covered with sand, which retarded the progress of the motorcycle. The plaintiff came upon the pavement while moving slowly upon his motorcycle, and started west along Independence avenue, when he struck some obstruction which stopped his wheel and threw him forward upon the pavement. There was at that place a pipe which protruded through the pavement two and a half inches above the surface. It was the only obstruction discoverable. When the motorcycle was picked up after the accident, its front wheel was close to such pipe.

The action is predicated upon the theory that such protruding pipe was the obstruction which caused the accident. The one contention of appellant is that the proof at this point is insufficient to submit to the jury. The plaintiff testified as follows: "As soon as I got on the asphalt pavement, I went to turn and go up Independence avenue, and as I turned something caught in the wheel and threw me. After I was thrown, made an examination, and there was nothing in the

street which could have thrown me off except the pipe in the street.” On cross-examination, he also said: “I did not know I had hit the pipe until I got up and looked around.” On cross-examination he testified: “I cannot say whether I struck the pipe squarely. I did not know I hit it until I got up. I did not know whether I hit the pipe at all until I got up and looked around. All I know is I struck something and was thrown from the motorcycle to the pavement.”

It is undisputed that the front wheel of the motorcycle was close to the pipe in question when first picked up. Appellant argues that this is proof conclusive that the pipe could not have been the cause of the accident, because the momentum of the motorcycle must have carried it some distance beyond the pipe after the collision. But the defendant's own witness, Gilly, testified that the machine did not advance any after the plaintiff was thrown.

The evidence was abundant to justify a finding by the jury that plaintiff was thrown by reason of some obstruction in the way of the wheel. It is undisputed that there was no other obstruction, than the one mentioned, nor is there any other reasonable explanation of the accident than that upon which the action is predicated. We think the question was clearly one for the jury.

Appellant relies upon *Tobin v. Waterloo*, 131 Iowa, 79, and contends that the holding in that case is decisive of this. But we think otherwise. No other question is presented for our consideration.

The judgment below must therefore be—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

W. E. BAIN, Assignee of GEO. A. NETCOTT, Appellee, v.
A. J. BRUCE, Appellant.

Building contracts: ENFORCEMENT: SET-OFF. Plaintiff's assignor for the benefit of creditors, a subcontractor, purchased material from a manufacturer, which was used in the construction of a school building before the same was paid for. The manufacturer did not comply with Code Section 3102, but the school district paid the manufacturer and withheld the amount from the principal contractor. *Held*, that as the material-man failed to establish his claim against the district he had no preference as a creditor of the subcontractor, and the school district could not create a preference by unauthorized payment, and therefore the principal contractor could not offset such sum against plaintiff who completed the contract of his assignor.

Appeal from Delaware District Court.—HON. FRANKLIN C.
PLATT, Judge.

SATURDAY, MARCH 14, 1914.

ACTION at law to recover the contract price of certain labor and material. The case was tried to the court without a jury, and a judgment rendered for the plaintiff. The defendant appeals.—*Affirmed*.

Cook & Balluff and Arnold & Arnold, for appellant.

Chappell & Todd, for appellee.

EVANS, J.—The plaintiff is the assignee of Geo. A. Netcott under a general assignment for the benefit of creditors, executed October 3, 1911. This action arises out of a contract made by Netcott prior to the general assignment. On May 11, 1911, the defendant Bruce entered into a contract with the independent school district of Gibson for the construction of

a school building. On June 20, 1911, Bruce entered into a contract with Netcott whereby Netcott agreed to furnish certain material and labor, including the brickwork, on said building for the sum of \$3,850. At the time of his general assignment for the benefit of his creditors, Netcott had not fully completed his contract with Bruce. Thereupon the assignee, plaintiff herein, completed such contract and now demands the balance of the contract price. The only defense urged is based upon the following facts: Netcott had purchased brick from the Blackhawk Manufacturing Company to the amount of \$589, and the same had all been laid in the building prior to the assignment. Payment for the same had not been made. On October 7, 1911, the Blackhawk Company filed with the independent district an itemized and sworn statement of its demand. The independent school district paid the same. It therefore withholds a like amount in its settlement with Bruce, the principal contractor; and Bruce seeks to withhold the same amount from Netcott and his assignee.

The last item of the account of the Blackhawk Company was furnished on July 28, 1911. There was therefore no compliance by the Blackhawk Company with the provisions of section 3102, whereby the independent district could have been rendered liable for the amount of the account. It is conceded for the appellant that the Blackhawk Company failed to acquire any lien or establish any claim against the independent district. He contends, however, that, inasmuch as the independent district actually paid the account to the Blackhawk Company, such payment operated to the benefit of Netcott in the payment of his debt, and that he is therefore bound by it, and that the rights of the assignee arise no higher than those of Netcott. The reasoning does not appeal to us. Section 3102 of the Code provides the manner whereby material and labor men may become preferred creditors, and whereby they may render the public corporation liable for their account to the extent of the money then remaining in its hands. If the Blackhawk Company had complied with the provisions of

such' section, a very different question would be presented. It did not do so. It was therefore not entitled to preference as a creditor of Netcott. There was nothing in the contract between the independent district and Bruce, nor in the contract between Bruce and Netcott, which entitled the independent district to pay any creditor of Bruce or Netcott except under the provisions of section 3102. The independent district could not work a preference for the Blackhawk Company as a creditor of Netcott by arbitrarily paying its account without any liability or authority so to do.

We think, therefore, that the facts relied on, as here set forth, do not constitute a defense to plaintiff's action. The trial court so held, and its judgment is—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

MRS. J. L. MATTHEWS, Appellee, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

New trial: GROUNDS: WITHDRAWAL OF CAUSE OF ACTION. Plaintiff sued in two counts, each based on delay in delivery of a telegram. At the close of the evidence the court withdrew the second count from the consideration of the jury and submitted the case upon the first count and a verdict for defendant was returned. *Held*, that the ruling withdrawing the second count was not a final adjudication from which plaintiff was required to appeal to preserve the right to urge error therein, but that it was a matter which could be urged as a ground for new trial, and a granting of new trial on such ground left no order from which plaintiff could appeal.

Appeal from Wright District Court.—HON. C. G. LEE, Judge.

SATURDAY, MARCH 14, 1914.

ACTION for damages for negligent delay in the delivery of a telegraphic message. There was a verdict for the defend-

ant. Upon motion of the plaintiff, a new trial was granted. The defendant appeals.—*Affirmed*.

Healy, Burnquist & Thomas, for appellant.

McGrath & Archerd, for appellee.

EVANS, J.—On the morning of September 10, 1910, a message was delivered to the defendant at Lake Fork, Ill., to be transmitted to the plaintiff to Eagle Grove, and to be delivered to her from the Eagle Grove office by telephone. The message advised the plaintiff of the death of her sister. It was not delivered to the plaintiff until 10.30 a. m., September 12, 1910, being Monday. The reason for the delay we will have no need to consider. Immediately upon receipt of the message, the plaintiff caused a reply message to be delivered to the defendant, to be transmitted to the sender of the first message at Lake Fork, Ill. This message advised her relatives that she would start on the first train, and requested that the funeral be delayed. This message was not delivered at Lake Fork, Ill., until about 4 p. m., Tuesday, September 13, 1910. The funeral was held on Monday afternoon; no word having been received by the Illinois relative from the plaintiff.

The plaintiff's petition was in two counts, based, respectively, upon alleged negligent delay in the delivery of each of the two messages. At the close of the evidence, the trial court withdrew the second count from the jury, and submitted the case upon the first count alone. Upon such first count, the jury rendered a verdict for defendant. The plaintiff's motion for new trial was based upon eight grounds, and was sustained generally. The eighth ground of such motion was that the trial court had erroneously withdrawn from the jury the second count of the petition. It is the contention of the appellant here that such eighth ground of the motion for new trial cannot be considered by us in support of the ruling sustaining the motion for new trial, because the plaintiff did not

appeal from the adverse ruling in the first instance, whereby such second count was withdrawn from the jury. Our conclusion on the question thus presented will be determinative of this appeal.

The appellant has argued all the grounds of the motion for a new trial which was sustained below, except such eighth ground. Its contention is that none of such grounds warranted the ruling. It has refused to argue the eighth ground of such motion for the reason, already indicated, that the appellee is not entitled to be heard thereon. To put it in another way, the appellant contends that the ruling of the trial court in withdrawing the second count was an adjudication, and that, in the absence of appeal by the plaintiff, it has become final and conclusive, and that it is not open for consideration upon this appeal of the defendant.

On the other hand, it is the contention of appellee that she was entitled to base her motion for new trial upon all alleged erroneous rulings of the court, including the withdrawal of her second count from the jury, and that the sustaining of the motion restored the status of her case as it was before trial.

It is clear to our minds that appellant's contention at this point cannot be sustained. If the verdict of the jury upon the first count had been in favor of the plaintiff, it would perhaps have eliminated all prejudice to her by reason of the adverse ruling of the court as to the second count. The verdict of the jury, however, being adverse to her upon the first count, there was still left to her the right of appeal. Upon such appeal she would have been entitled to a review of the entire record, including the adverse ruling upon the second count. If she was entitled to such review here by appeal, she was entitled to the same review by motion for new trial in the lower court. Her motion for new trial having been sustained, it left no judgment or order from which she could appeal. We hold, therefore, that she was entitled to assign the withdrawal of the second count of the petition as one of the grounds

of her motion for new trial; and that the order of the trial court sustaining such motion was effective to set aside such ruling and to reopen the entire case to a new trial. For the purpose of this appeal, we must assume the sufficiency of such eighth ground to sustain the motion for new trial. The appellant has not assailed it, except in the manner already indicated. The record pertaining to the second count has been omitted from appellant's abstract on the theory that the merits of the court's ruling as to the second count was not involved in this appeal. Neither has appellant's argument dealt with the merits of such ruling. The appeal, therefore, has been made to turn at this point upon a question of practice only. The merits of the original ruling, which was set aside by the order granting a new trial, is not submitted for our consideration by the appellant. In the state of the record therefore, we cannot assume to deal with the merits of the original ruling. Indeed, in view of a new trial, we deem it preferable to avoid a discussion of the evidence.

It is sufficient to say that it is not made to appear upon this record that the trial court exceeded its discretion in granting a new trial. Its order, therefore, is—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concurring.

ANNIE OVERTON, Appellee, v. CITY OF WATERLOO, Appellant.

Municipal corporations: DEFECTIVE WALKS: NEGLIGENCE: EVIDENCE.

1 In this action for personal injury caused by a defect in a sidewalk, the evidence is reviewed and held to require submission of the issues of negligence of the defendant city, and of contributory negligence on the part of plaintiff.

Same: CARE REQUIRED: INSTRUCTION. A pedestrian without knowledge

2 of defects in a sidewalk may assume that the city has exercised ordinary care to keep its walks in reasonably safe condition; but he is bound to use ordinary care for his own safety, and may not assume that he can use the walk with no care on his part.

Same: CONTRIBUTORY NEGLIGENCE. Where the attention of a pedestrian while walking along the sidewalk was attracted by the display of goods in the store windows, and while thus engaged she stepped in a hole in the walk which she had not noticed, fell and was injured, she was not guilty of contributory negligence as a matter of law.

Appeal from Black Hawk District Court.—HON. CHARLES E. RANSIER, Judge.

SATURDAY, MARCH 14, 1914.

ACTION for damages received from a fall on a sidewalk, caused by stepping into a hole in the walk. Trial to a jury; verdict and judgment for plaintiff for \$500. Defendant appeals.—*Affirmed.*

J. I. Kenyon, City Solicitor, and *B. F. Swisher*, for appellant.

J. T. Sullivan, for appellee.

PRESTON, J.—I. No question is raised as to the sufficiency of the evidence to show negligence of the city, or the amount of the verdict. Plaintiff was hurt in the daytime, about 7:30 o'clock in the morning. The defect had existed for such a length of time as to charge the city with notice. There is no complaint of the instructions.

Appellant makes two points: First, that the evidence fails to show that plaintiff was injured because of the negligence complained of; and, second, that she was guilty of contributory negligence.

We are of the opinion that, under the evidence, both of these questions were for the determination of the jury. The negligence alleged is that plaintiff negligently allowed the cement sidewalk to become damaged, broken, and out of repair, so that a large hole about three inches in depth, twelve inches in width, and eighteen inches in length was allowed to remain in the walk. The court in its instructions limited the

1. MUNICIPAL CORPORATIONS: defective walks: negligence: evidence.

recovery, if any, to this particular charge. It appears that the walk at the point in question, as described by some of the witnesses, was composed of six-sided blocks of cement.

The witnesses did not all agree exactly as to the description of the defect. One witness describes it as a depression about three inches deep and about six inches wide and eighteen inches long, and says: "It seemed as though half of the block was loose; you would step on it, and it would tip." Another witness says he did not notice it very much, but saw a hole big enough to put your foot in, and that there was sand at the bottom of it. Another describes it, saying there was a hole there some way not quite square, and that it seemed to be a kind of a place broken out; as they were walking along they had been kicking the sand out; the cement was out and they had been kicking it out. Another says it was about ten by twelve inches, and three or four inches deep. Others think about two inches deep.

Whether plaintiff was injured by stepping in this hole is one of the questions. Appellant says the evidence does not show that she was so injured. The evidence is not very specific on the point, but, taking it all together, we think there was enough to take the case to the jury, and to sustain the verdict.

Plaintiff testified:

I was going to my work, and I walked until I got opposite the Golden Rule, . . . and I felt my foot give away. I was looking in the windows—in the store windows—as I was passing, and my foot turned, and I was thrown down, and I did not—I knew that I was opposite the Golden Rule, but I didn't know anything more for quite awhile. Well, I was going down, walking down the street, going to my work, and I was just walking at a moderate rate, and of course I was looking in the store windows as I was passing, and on a sudden I felt my foot turn, and I didn't know what it was, but I felt it give way down in a hollow, and I was thrown violently down on this side. I didn't lose my senses altogether, but I did very near, and they carried me into the Golden Rule store.

(Her cross-examination is as follows:) Q. And, as you say, you were walking along looking into the store windows, and suddenly you fell? A. Yes, sir. Q. That was the way this accident happened? A. Yes, sir.

Mrs. Green testified:

I saw her fall. I was standing in the door. I got there early and was standing in the door looking out, and this lady came hurrying along, stepped in the hole, and fell.

(On cross-examination, she said:) I was not looking at Mrs. Overton as she came along there especially but just stood in the door looking around. My attention was called to her as she fell. I saw her falling; that was the first I noticed her especially. . . . My attention was attracted to her because she was falling. She was the only person in front of the store at the time she fell. She fell close to the building—I should judge about five or six feet from the building. Q. Now, for the purpose of getting this clear, Mrs. Green, I will ask you to state as to whether or not you saw her fall at the point in the walk where the hole was? A. Yes, sir. Q. You concluded that, because you saw a hole in the walk afterwards, that she fell in that hole, did you? A. Well, I was sure that she stepped in the hole. Q. That is the manner of reaching the conclusion that she stepped in the hole, isn't it? A. Yes, sir; I saw her foot turn and saw her fall. Of course, I could not see the hole to say sure that was it, but I saw her foot turn and saw her fall. Q. Now, what makes you say that you saw her foot turn; what causes you to remember that now? A. I naturally remember anything like that, when you see them sway and fall like she did. Q. And you said that you didn't see her step in the hole? A. No; I didn't see. Q. So that, so far as what caused Mrs. Overton to fall, other than she fell on the sidewalk, you don't know and you couldn't tell positively? A. No, sir; I couldn't swear that she stepped in the hole. Q. And you don't know what caused her to fall on the sidewalk? A. She fell right there by the hole, and they picked her up right there. Q. She fell by a hole that you looked at afterwards? A. Yes, sir. Q. But whether she stepped in that hole, all you know is she fell on the sidewalk? A. Yes, sir. Q. You saw the hole as she was lying on the walk, did you? A. Yes, sir. Q. And she was lying by the hole? A. Yes, sir.

Hargreave said he did not see plaintiff fall, but saw her right afterward, and that this hole was right close to where she fell; that the hole was about five feet from the building; that they picked plaintiff up about five feet from the building.

II. Plaintiff's evidence before quoted shows that at the time of her injury her attention was attracted to the show window of the store she was passing, and, while walking along and looking at the articles in the show win-
 2. SAME: care re-
 quired: instruc-
 tion. dow, she fell, as the jury could have found, by stepping into the hole in the walk. She was walking along as a person ordinarily would. Plaintiff did not know of the defect. It was a clear day. The court instructed:

The plaintiff had the right to assume that the city had exercised ordinary care to keep the walk in a reasonably safe condition for travel, but she had no right to assume that, without care on her part, she could safely walk along the same, but, on the contrary, it was her duty to use ordinary care and watchfulness for her own safety while passing along said sidewalk, and a failure to perform such duty would be negligence on her part. . . . In passing upon this issue, you will consider the location, the time of day, to what extent, if any, the alleged defective condition of the walk was visible or known, or should have been known to the plaintiff, the dangers reasonably to be apprehended therefrom, the manner in which the plaintiff was conducting herself at the time, and all the facts and circumstances as disclosed by the evidence concerning and surrounding the accident, for the purpose of determining whether the plaintiff was exercising the care and watchfulness for her own safety in walking along such sidewalk that an ordinarily careful and prudent person would have exercised under like circumstances, and whether a failure on her part to exercise ordinary care caused or contributed to cause such accident.

The case is ruled by the holding in *Mathews v. Cedar Rapids*, 80 Iowa, 459, and like cases, rather than *Ryan v. Foster*, 137 Iowa, 737, 741, and such cases. These two cases illus-

trate the distinction between a defect in the walk itself and an obstruction plainly observable on the walk. In the *Ryan* case the obstruction on the walk was of such size and character that it was plainly visible, and the most casual glance would disclose its presence. In that case the plaintiff's attention was not in any manner diverted.

Appellee has cited no cases on either point. Ordinarily the question of contributory negligence is for the jury.

Under the facts of this case, plaintiff was not guilty of contributory negligence as a matter of law, and the court properly submitted the case to the jury for determination. As bearing on this proposition, see, also, *Earl v. Dlack*, 126 Iowa, 361, and cases at 365; *Taylor v. Railway*, 112 Iowa, 157, 161.

3. SAME: contributory negligence.

There was no error, and the judgment is—*Affirmed*.

LADD, C. J., and EVANS and WEAVER, JJ., concur.

W. D. KINNEY (C. A. KINNEY, Substituted Plaintiff), Appellee, v. L. T. REED, Appellant.

Pleadings: AMENDMENT: MOTION TO STRIKE. Where plaintiff in a
1 substituted petition repleaded the same matters contained in the original petition, and in addition thereto the necessary averments to comply with the ruling upon a demurrer to the original pleading, a motion to strike the substituted petition on the ground that it alleged the same matters was properly overruled.

Contracts: PAROL EVIDENCE. Where an agreement of the parties is
2 clearly embodied in a writing, mere contemporaneous parol agreements are not provable. Thus the written agreement for the sale of a physician's practice for a stated sum, to be paid by the application of a certain per cent of the purchaser's earnings, constituted a contract complete in itself; and was not rendered uncertain by the provision for payment when his earnings reached a stated sum.

Same: LIMITATION OF ACTIONS. Where a written contract was complete
3 and definite in its terms, without the aid of oral evidence, the
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statute of limitations which bars actions upon oral contracts in five years has no application.

Exclusion of evidence: REVIEW OF RULING. A ruling excluding evidence will not be review on appeal, where there is nothing in the record disclosing the nature of the excluded evidence.

Same: PAROL EVIDENCE: VARIANCE. In this action upon a written contract to pay a stated sum for a physician's practice by payment of a certain percentage of defendant's earnings, an offer in evidence of an allegation of defendant's answer, as an admission that he had earned a certain sum, did not open the door to defendant for the admission of oral evidence tending to vary the writing.

New trial: REMARKS OF COURT: REVIEW. There was no impropriety in the court's remark to counsel, in ruling upon objections to evidence, that prior or contemporaneous agreements were not admissible to vary the writing sued upon, and if the writing did not express the agreement of the parties it could be reformed by a proper proceeding, but not in a law action. Besides no exception was taken to the remarks and the alleged error was not therefore reviewable.

Appeal from Taylor District Court.—HON. H. K. EVANS, Judge.

SATURDAY, MARCH 14, 1914.

SUIT to recover \$500 and interest on a written contract. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

R. T. Burrell, McCoun & Brant, for appellant.

Frank Wisdom, for appellee.

PRESTON, J.—I. The contract sued upon, the execution of which is admitted, follows:

Gravity, Iowa, Apr. 12, 1901. This agreement made and entered into by and between Dr. W. D. Kinney of the first part, and Dr. L. T. Reed of the second part, witnesseth, that

W. D. Kinney of the first part has this day bargained and sold unto L. T. Reed of the second part, all his practice as a physician and surgeon in Gravity and vicinity thereto. For the sum of five hundred dollars to be paid as follows, 20% of the said L. T. Reed's earnings as a physician and surgeon as long as he practices until the aforesaid five hundred dollars, is paid, then this contract to be null and void. When a payment is made Dr. Kinney is to receipt Dr. Reed for same. I, Dr. Kinney agree not to practice medicine in Gravity and vicinity for a term of five years. W. D. Kinney. L. T. Reed.

Acknowledged before a notary by both parties April 12, 1901. This was assigned to C. A. Kinney, who was substituted as party plaintiff.

Both parties seem to have had trouble with their pleadings, which are quite voluminous. Plaintiff's first attorney started out with a petition in equity, alleging that the contract was only partly reduced to writing, and asked a reformation of the contract, which seems to be unambiguous and needed no reformation. Plaintiff also asked judgment on the contract for \$500 and interest. An amendment was filed, withdrawing two paragraphs of the original petition; and which amendment also alleged that he did not know and had no means of knowing what sums of money defendant had earned since the making of the contract.

Defendant demurred to the petition as amended, on the ground that it did not show anything due; that it did not show that defendant had earned \$2,500; and that no such facts were alleged as to justify reformation because no mutual mistake was charged. The demurrer was sustained. Thereupon plaintiff filed a substituted petition in two counts; the first stating a cause of action at law and supplying the allegations, the absence of which made the original petition demurrable; that is to say, he alleged:

Paragraph 3. That defendant has practiced medicine and surgery in Gravity, Iowa, and vicinity since April 12, 1901, in a prosperous and lucrative manner, and has earned the sum of \$2,500 from such practice.

Paragraph 4. That plaintiff has made several demands upon defendant for an accounting of said earnings since April 12, 1901, and for the payment of said \$500 or so much thereof as might have been found due, and defendant has refused to make said accounting, and has refused to pay said \$500, or any part of it.

The second count set up again the equitable issue, and asked a reformation, accounting, and discovery.

Defendant moved to strike the substituted petition. His motion contained five divisions, but in no one of them does he indicate which count or paragraph he strikes at. It is apparent, however, that in all but one he refers to the second count. It is not necessary to further notice these, because plaintiff submitted to the motion in so far as it referred to the second count. In so far as the motion aims at count 1, it is on the ground that it sets up the same cause of action as stated in the original petition, to which the demurrer had been sustained.

This part of the motion was overruled, and, we think, properly so, for the reason that count 1 of the substituted petition is not a repleading of the same matters; but, as we have said, it only supplied the necessary averments which were lacking in the original. This being so, the cases cited by appellant do not apply. At this stage of the proceedings the cause, upon motion of defendant, was transferred to the law docket.

Defendant answered, denying liability; admitted that plaintiff had made demand for an accounting, and for payment, which had been refused. He alleged, further, that the contract "was signed and executed without consideration, because the plaintiff represented to defendant that he had a large practice as a physican and surgeon at Gravity and vicinity and that, in truth, said representations were false, and plaintiff knew them to be false at the time, and made them with the intention of cheating and defrauding defendant, and that at the time plaintiff had no practice as a physician and

1. PLEADINGS :
amendment :
motion to
strike.

surgeon at that place; (2) that defendant's signature was procured by fraud, for that during the negotiations the plaintiff fraudulently caused a telegram to be delivered to him from some person unknown to defendant, asking if plaintiff would sell his practice for \$500, which message was exhibited to defendant intending to have him believe that some one else would buy the practice if he did not." The issues above referred to were submitted to the jury, and there is no complaint of instructions with reference thereto, or that the verdict is not sustained by the evidence.

II. During the trial, defendant amended his answer, and alleged substantially :

(1) That at the time of the making and execution of the written contract sued on it was mutually agreed that plaintiff would remain with defendant four weeks and help him get started. (2) That at the time of the making of said contract there was an oral agreement between the parties that said defendant would render an account of his earnings to Kinney at reasonable intervals. That between date of said contract and April 12, 1904, he had earned \$2,500 in his practice, and, owing to such fact and said oral agreement in connection with said written contract, plaintiff's cause of action is barred by the statute of limitations, as plaintiff did not begin his action until December 3, 1910. (3) That the written contract sued on is of such language and character that it requires verbal testimony to make it complete, and therefore a cause of action is barred upon it after five years from April 12, 1904.

This pleading was filed after the cause had been transferred to the law docket. On the trial the defendant sought to show by his witnesses, and by cross-examination of plaintiff, the agreements thus alleged, and which were not included in the written contract.

Plaintiff's objection to such evidence was sustained, and of this appellant complains. The gist of the complaint is as to the bearing such evidence would have on the question of the statute of limitations. He also complains that the court

failed to instruct the jury on the question of the statute of limitations. The determination, then, of the question as to whether the court properly sustained the objection to the line of evidence indicated determines these matters in regard to the statute of limitations.

It will be observed that the last amendment to the answer does not allege that the contract was partly in parol and partly in writing; nor is any reformation asked by the defendant.

2. **CONTRACTS: parol evidence.** The written contract was complete in itself; the \$500 was due when defendant had earned \$2,500, and the time of payment of the \$500 was made certain by proof of that fact; such evidence was no part of the contract, but an independent fact. The liability of defendant is upon his written promise to pay \$500 when a certain thing had occurred; that is, when he had earned \$2,500.

Wing v. Evans, 73 Iowa, 409, was an action to recover the price of goods sold under a written contract. In that case the court said: "It is true that plaintiff, before he will be entitled to recover, must prove a delivery of the goods, and that fact must be established by evidence other than the writing. But the action is upon the written promise of defendant to pay for them within a specified time after delivering. He is liable, if at all, not simply because the goods were delivered, but because he promised to pay for them. That promise, and not the fact of delivery, is the ground of his liability, and that promise is in writing, and the action thereon would not be barred until the expiration of ten years from the time it arose." And see *White v. Savery*, 50 Iowa, 518.

The same rule applies to the contract in this case. Whether defendant agreed to account and failed to do so is wholly immaterial. It is clear that the offered evidence comes within the rule that prior or contemporaneous parol agreements may not be shown but are merged in the writing.

Defendant contends that, where the contract is such that verbal testimony is required to make it complete, the con-

tract is a parol contract, and is barred in five years. Plaintiff concedes this is the rule; but, as we have said,
 3. **SAME: limita-
tion of actions.** this writing was complete in itself, and, the court having properly excluded the parol evidence to vary its terms, there was no question as to the statute of limitations left, for the action was on a written contract. Further, some of the questions were put before defendant had filed his last amendment.

Still, again, as to other of such questions, the questions themselves do not show that the evidence was proper, and there was no offer to prove. This point is illustrated by the following interrogatories: "Q. Now, at the
 4. **EXCLUSION OF
EVIDENCE: re-
view of ruling.** time of the making and entering into this contract, did you have any other agreements with Dr. Kinney?" "Q. Well, did you have an agreement there, Doctor, with Dr. Kinney as to anything you was to do not mentioned in that contract?"

Plaintiff offered a part of defendant's answer to show an admission that defendant had earned \$2,500, and when it was earned. This offer did not open the door to the extent
 5. **SAME: parol
of evidence:
variance.** claimed by defendant and permit the introduction of parol evidence to vary the terms of the writing. Still another contention of defendant is that he alleged fraud, and that therefore he was entitled to greater latitude in the examination of witnesses. An answer to this is that the court did permit inquiry as to all matters alleged as fraud. But counsel were seeking to widen the inquiry and change the terms of the writing, as they stated to the court at the time, for the purpose of showing that the action was barred by the statute of limitations.

III. It is now objected that the trial court erred in certain remarks during the trial. No exception was taken thereto. Had they been excepted to, there was no impropriety.

The remarks were addressed to counsel, and
 6. **NEW TRIAL: re-
marks of court:
review.** were a part of the rulings on objections to evidence. The substance of the statements was that prior or contemporaneous verbal agreements were inad-

missible to vary the term of the writing; and that, if the contract did not express the agreement of the parties, it could be modified in a proper proceeding, but not in an action at law.

No error appears, and the judgment is—*Affirmed*.

LADD, C. J., and EVANS and WEAVER, JJ., concur.

DAVID A. COLLIER, Appellee, v. ZETTIE WETMORE et al,
Appellants.

Quieting title: DISCLAIMER: TAXATION OF ATTORNEY'S FEES. The
1 statute providing that a defendant, in an action to quiet title, refusing to execute and deliver a quit claim deed after tender of the expense of the same, cannot avoid the ordinary costs and attorney's fees by filing a disclaimer, does not apply to cases where the defendant in good faith submits his adverse claim for determination by the court. Thus in an action for partition, to which defendants filed a cross bill asking to have their title quieted, they could not upon rendition of judgment in their favor, claim an attorney's fee, although having complied with the statute.

Same: DISCRETION OF COURT. The statute authorizing the taxation of
2 attorney's fees upon the filing of a disclaimer in quieting title actions makes the same a matter of discretion with the trial court; and the appellate court will hesitate to interfere with an order refusing the taxation of such fees, in the absence of a showing of an abuse of such discretion.

Appeal from Plymouth District Court.—HON. J. F. OLIVER,
Judge.

SATURDAY, MARCH 14, 1914.

THE opinion sufficiently states the case.—*Affirmed*.

F. W. Edwards, J. M. Wormley and Sager, Sweet & Edwards, for appellants.

F. T. Hughes and H. S. Martin, for appellee.

WEAVER, J.—The plaintiff, Collier, claiming to be the owner of a one-third interest in certain real estate, brought this action in partition. At the same time he brought one hundred and seventy-one other actions of like character against other defendants for the partition of as many other lots or tracts of land. The claim of title thus asserted was of the same general character in all the cases; the alleged title being based on essentially the same state of facts, and traced from the same common source, to-wit, a certain quitclaim deed from one George B. Smythe, the surviving husband of a deceased former owner. After these actions were begun, but twenty days before filing any answer or cross-bill, the defendants in each case formally requested the plaintiff to execute to them a quitclaim deed to the lot or tract of land in question, and tendered to him \$1.25 to cover the cost of executing and delivering such conveyance, and in each instance such request and tender were refused. Thereafter in each case the defendants answered, denying plaintiff's claim of title, and by way of counterclaim or cross-bill affirmatively alleged title in fee in themselves, which they asked to have quieted against plaintiff. In each case, also, they further pleaded the fact of their request or demand upon plaintiff for a quitclaim deed, and the tender to him of said sum of \$1.25 to cover the necessary expense so occasioned, and his refusal thereof, on which showing they asked that an attorney's fee be allowed them as provided in Code, section 4226.

It should be stated that many of these defendants derived the title to the lands in controversy through conveyances with warranty mediately or immediately from a corporation known as the Iowa Railroad Land Company, which company also still held other lands affected by like claims of title on the part of plaintiff, and that, to protect its own interests and those of its grantees, said corporation instituted an action in equity to quiet said title against the claims of Collier, and naturally made common cause with the defendants in the partition cases.

Issues being joined, the parties by their counsel entered into a stipulation as follows:

It is hereby stipulated and agreed as follows between the parties to the above-entitled suit and all other like suits brought by David A. Collier in said court for the partition of the town lots in the town of Kingsley, Plymouth county, Iowa, and of lands in Plymouth county, Iowa:

(1) That the defendants may bring on for trial at the December, 1908, term of said court one of said causes, and such one as they may file trial notices in within one month prior to the first day of the next term of the district court of said Plymouth county.

(2) That plaintiff may bring on for trial one of said causes for the same term of court upon filing a like trial notice in said cause.

(3) That the remainder of said causes shall stand continued with leave to both plaintiff and defendant to further plead after the trial of the cause or causes above mentioned, if either party shall so desire.

(4) That depositions and evidence may be taken on behalf of the plaintiff or defendant in the cause designated for trial, and, when so taken, may be read not only in the cause above, or the cause upon which said trial was had, but in all other similar causes pending in said court, with the same force and effect as if taken in each of said causes.

(5) That any testimony or evidence given or taken on the trial of said cause or causes may be read on the trial of each and every other cause, if trials therein are had.

(6) Since the questions of law and fact are practically the same in all the above cases, it is the purpose of this stipulation to save counsel as much time and labor as possible in determining the questions involved.

Pursuant to this stipulation the parties designated for the test of actual trial the case brought by the Railroad Land Company to quiet title and the case brought by Collier against one Smaltz for partition. These two actions, while retaining their independent character, were treated as one for the purposes of trial, and submitted upon the same evidence and arguments. The trial court found against the claims of Collier,

ordered that the deed of conveyance upon which his claim of title was founded be canceled of record, that said Collier be forever barred, estopped, and enjoined from asserting any right or title in any of the described lands against the title of the Railroad Land Company or its grantees, and that he be enjoined and restrained from further prosecution of any of the other pending suits. It was further provided that said decree should not affect the right of any of the defendants in the actions in which proceedings had been suspended by stipulation, or prevent them from taking decrees against Collier in their individual cases quieting their respective titles, and for such attorney's fees claimed by them as they might thereafter be found entitled to recover. Collier thereupon prosecuted an appeal to this court in both cases, and both were affirmed in a single opinion reported in 149 Iowa, 230.

The appeals having been disposed of, Collier did not further prosecute the remaining 171 cases, and in each of them the defendants asked and were granted decrees upon their cross-bills establishing and quieting their title as prayed, with judgment against plaintiff for taxable costs, but refusing to tax attorney's fees claimed by the defendants. From this last ruling, the denial of defendants' demand for attorney's fees, the appeal now before us has been taken.

I. Question is raised at the outset whether the court has jurisdiction to entertain the appeal, because it is said, appeals from a mere question of taxing costs will not be considered, and because the amount in controversy does not in any one case exceed \$100. As we find the case may be affirmed on its merits, we shall not take time to consider the objection thus raised. It is at least open to doubt whether a refusal to tax an attorney's fee, where a party has a statutory right thereto, comes within the rule which makes the taxation of ordinary costs nonappealable. So, also, it is a fair question, which we need not now attempt to decide, whether the case is not within the statute which makes a judgment or decree in an action in-

volving title to real estate an exception to the limitation provided in Code, section 4110.

II. The appellants' demand for the taxation of attorney's fees is based upon Code, section 4226, and if, when properly construed, that section is not applicable to the circumstances here presented, then admittedly the ruling of the trial court must be affirmed. The statute in question reads as follows:

1. QUIETING
TITLE: dis-
claimer: taxa-
tion of attor-
neys' fees.

Section 4226: "If a party, twenty days or more before the bringing suit to quiet title to real estate, shall request of the person holding an apparent adverse interest or right therein the execution of a quitclaim deed thereto, and shall also tender to him one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and if he shall refuse or neglect to comply therewith, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may, in its discretion, *if the plaintiff succeeds, tax, in addition to the ordinary costs of court, an attorney's fee for plaintiff's attorney, not exceeding \$25,*" where a single tract of not more than forty acres is involved, and a proportionately greater maximum where the property is of greater extent.

The argument by which the claim is sought to be sustained is that the filing of the counterclaim or cross-bill asking to have title quieted in defendants was in effect the beginning of an independent action for affirmative relief, and the provision for attorney's fees is applicable to precisely the same extent as if the defendant had begun an entirely distinct and separate suit. It is very evident from the reading of the statute that the Legislature did not intend to make an attorney's fee taxable in every action to quiet title for, if such had been the purpose, we may assume it would have been expressed in clear terms. The circumstances giving rise to this provision are matters of common knowledge to members of the profession. In the earlier years of the history of this state

much carelessness in conveyancing and in the keeping and preservation of public records, to say nothing of reckless speculation in cheap lands without proper attention to the preservation of muniments of title, and the trading and trafficking in mere apparent equities having no meritorious foundation, naturally resulted in leaving the record title to much of our real estate clouded by apparent defects which tended to alarm cautious buyers, and to depreciate the market value of real property. To remove these defects was often a matter of much trouble and expense, even where they were purely formal or technical. It not infrequently happened that persons asserting no claim of title, but from whom a quitclaim or disclaimer of some kind was necessary to perfect a record, refused to give it until they had forced the real owner to pay a substantial, if not exorbitant, consideration for the release of merely nominal claims. To put an end to this extortion and unnecessary expense and vexatious litigation, this statute was enacted. Prior thereto an obstinate or litigious holder of an apparent record interest in land, though without the slightest merit or value in fact, could refuse to remove this cloud, and, when the real owner had been driven to bring an action against him to quiet title, he had only to appear, file a disclaimer, and leave the injured party to pay the expense. This abuse is quite effectually remedied by the present statute. Under it, when the proper demand and tender have been made, "the filing of a disclaimer shall not avoid liability for costs in an action afterward brought and the court may in its discretion, if plaintiff succeeds, tax . . . an attorney's fee." The reading of the statute leaves wide room for doubt whether the provision has any application, except where there is an attempt by such defendant to escape liability for costs by disclaimer of title after fair opportunity given him to make such disclaimer effective by quitclaim deed before suit is brought. To say the least, we think it clear the statute was not intended to penalize with the taxation of an attorney's fee the party who asserts what

he believes to be a valid interest in land adverse to the claim of a plaintiff in proceedings to quiet title, and appears in good faith and submits such alleged interest to the court's adjudication. It may well be that, if the claim so pleaded is shown to be without reasonable foundation, or the defense made is merely obstructive or vexatious, the court, in the exercise of the discretion with which it is expressly clothed by the statute, may tax an attorney's fee where a demand and tender have been made, even in the absence of a disclaimer by the defendant.

But we cannot agree with the appellant's contention that, in claiming an attorney's fee in this case, they stand upon precisely the same footing as if the partition case had never been begun, and they had themselves brought an action against Collier to quiet title after due demand of deed and tender of money to pay the expense. The purpose of the statute, as we have already noted, is to avoid litigation, and enable the landowner to get rid of clouds upon his title by negotiation and agreement rather than by decree of court. But in the case before us the defendants were already in court. By plaintiff's action, in which he asserted a one-third ownership in fee, and demanded partition, he presented for the court's consideration the validity of his claim of title, and the defendants, having been brought into the court's jurisdiction by proper notice, and desiring to contest his claim, could do so by mere denial, or by asserting affirmatively their own title, or both. That case, tried to final decree, would have settled their respective rights in the premises forever. Defendants could not thereafter have maintained another action against the same parties to adjudicate again their respective claims of ownership. They could, of course, in their answer, couple with such claim of ownership a prayer for affirmative relief by way of a decree quieting their title as they in fact did, and while, to this extent, the pleading was the equivalent of a petition in an independent action, in that it would support a grant of the same relief which

could have been so obtained, there was in fact no independent action. While the pleading stated grounds upon which affirmative relief could be granted, such grounds were in a very just sense of the word pleaded defensively, in that, if such allegations were truly stated and sustained by the evidence, they constituted an insuperable reason why Collier's claim should be rejected and held for naught. If, after such action for partition had been begun, and opportunity thus afforded the defendant to join issue upon plaintiff's assertion of title, and there contest, determine, and settle all their respective claims of right, defendants, while answering defensively only, had instituted a wholly separate and independent action to quiet their title to the same land, the court would undoubtedly have refused to permit its prosecution, or would have ordered the consolidation of the cases, giving the petition in the latter case the effect of an answer or counterclaim in the action first begun. Collier was the original moving party. He was not, so far as appears, holding a merely nominal claim which he knew to be valueless for the purpose of forcing a bid for its release. He had taken a deed of conveyance from one who had at least a fairly debatable claim of title, and had brought that title into court for adjudication, summoning all persons adversely interested to appear and defend. In that proceeding the widest possible opportunity was afforded for each and every party to the case to present and establish his claim of title, if any he had. Indeed, such party could not safely refuse to make a full showing and defense without inviting an adjudication which would fairly estop him from thereafter asserting any right in the subject-matter of controversy. To say that, when the plaintiff has done this, the defendants, by the simple expedient of a demand and tender under a statute which quite clearly has no application to partition proceedings, may force him to abandon the same, unless he elects to go ahead at the hazard of being mulcted in a very burdensome aggregate of attorney's fees for the benefit of the opposing parties—a consequence

which is attached to failure in no other kind of litigation known to our practice—is a proposition which cannot be justified as a matter of simple justice, and is not, we believe, contemplated by the statute.

There is still another aspect of the case which we think is equally conclusive against the position of the appellants. The taxation of an attorney's fee under Code, section 4226,

2. SAME: discretion of court. is in no case a matter of right to be granted at the demand of a party who has given proper notice and made the proper tender. The Legislature seems to have recognized the possibility that in at least some instances the party holding an adverse claim of right or title, and refusing to release the same by quitclaim, may act in good faith through an honest, even if mistaken, estimate of law or fact, and that the taxation of attorney's fees in all cases where such claims are overruled would not be equitable. The provision for such fees was therefore not made absolute, but permissive only; the taxation being allowed "in the discretion of the court." It follows, we think, that this court should be slow to interfere with that discretion, except where abuse thereof is shown. The trial court refused to make any allowance of this nature. The record does not disclose the ground of the refusal. It may have been because the court did not think the statute had application to actions of this nature, or it may have believed that plaintiff's case was brought in good faith, and that, in the exercise of the discretion given by the statute, the imposition of such a charge would not be equitable. The admitted facts would seem to support either conclusion.

Other phases of the question have been argued by counsel; but those of which we have made mention appear to be controlling, and we shall not further pursue the discussion. We have thought it unnecessary to state or discuss the nature and origin of the title under which the plaintiff asserted his claim to a share in the lands in controversy. They are sufficiently set forth in the opinion handed down on the for-

mer appeal, and this appeal requires no review thereof. All parties have accepted the result there announced as final and conclusive upon all disputed questions of property right.

For the reasons already stated, we hold that the ruling appealed from is right, and it is therefore—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

RUDOLPH HARDWARE COMPANY, Appellee, v. M. F. PRICE, and
L. E. LYON, trading as LYON TAYLOR Co., Appellants.

Statutes: FOREIGN LAWS: PROOF: PRESUMPTION. To render a printed
1 copy of the statutes of another state admissible in evidence to prove the law of that state, the same must of itself purport to be published under the authority of the foreign state, or there must be other competent proof that the book was commonly admitted as evidence of the statute law by the courts of that state, as required by the statute of this state; and in the absence of competent proof of the law of a foreign state it will be presumed to be the same as that of this state.

Judgments: RECORD EVIDENCE. The entries required to be kept by the
2 clerk of courts in a book called the combination docket are not sufficient to establish the rendition of a judgment; the record of the judgment itself is the best evidence and is alone admissible to prove the judgment, in the absence of any ground for the introduction of secondary evidence.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

SATURDAY, MARCH 14, 1914.

ACTION on a foreign judgment. Directed verdict for plaintiff. Defendants appeal.—*Reversed*.

Remley & Calkins, for appellants.

W. J. Baldwin, for appellee.

PRESTON, J.—The only evidence introduced was what plaintiff claims to be the statutes of Pennsylvania, and the certified copies of the proceedings of the court of common pleas of Allegheny county in the state of Pennsylvania, and the alleged judgment in favor of plaintiff and against defendants.

Defendants first moved for a directed verdict, which was overruled. The trial court then sustained plaintiff's motion, and rendered judgment against defendants. Appellants contend: (1) There was no competent evidence introduced to show a judgment against the defendants, or that the alleged judgment sued on was a valid judgment. (2) There was no competent evidence that the entries introduced as Exhibit A would be given the faith and credit of a judgment in the state of Pennsylvania under the Constitution and laws of the United States, or be accepted in the courts of Pennsylvania as evidence of a judgment, and that, even if admissible, the record does not show that there was a judgment either under the laws of Pennsylvania or of Iowa.

Appellee has not argued the question as to the admissibility of the books supposed to prove the laws of Pennsylvania, but says that the Pennsylvania laws are substantially the same as the laws of Iowa, and that, under our statutes, the record shows that there was a valid judgment.

I. To prove the laws of Pennsylvania, plaintiff offered in evidence Brightly's Purdon's Digest in two volumes. On the back of each volume appears the following: "Brightly's Purdon's Digest," with the index letters and "1700-1883." The title page is as follows: "A digest of the Laws of Pennsylvania, from the year one thousand seven hundred to the sixth day of July, one thousand eight hundred and eighty-three, originally compiled by John Purdon, Esq., eleventh edition revised with notes to the judicial decisions, by Frederick C. Brightly, Esq., author of 'Pennsylvania Digest,' 'Federal Digest,' etc.

1. STATUTES : for-
eign laws :
proof : pre-
sumption.

Vol. I [II]. Philadelphia: Kay and Brother, Law Booksellers and Importers, 1885."

To the offer defendants made the following objection: "Defendants object as irrelevant, incompetent, and immaterial: First, there is no pleading of any law of the state of Pennsylvania; none having been pleaded the offer is immaterial; second, the book offered does not purport to have been published by authority, and no evidence making it competent has been offered, the publication being wholly unauthorized by statute, so far as the same appears from the book itself, and no evidence is offered to show this digest is received by the courts of Pennsylvania as the law of that state." The objection was overruled.

Our statute (section 4651) provides: "Printed copies of the statute laws of this or any other of the United States, or of Congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws."

These books do not purport to have been published under the authority of the state of Pennsylvania, and there was no proof that they had been so published, or that they were commonly admitted as evidence in the courts of that state, nor were the statutes of Pennsylvania authenticated in any other manner. It is clear they were not admissible in evidence. *Goodwin v. Assurance Ass'n*, 97 Iowa, 226.

Under these circumstances, the laws of Pennsylvania will be presumed to be the same as our own. The claim is that the defendants in this action were plaintiffs in the case in Pennsylvania, and that the judgment was rendered against them on a counterclaim.

II. The exemplification of the record contains copies of

dockets and documents. Defendants interposed proper
2. JUDGMENTS: objections to this evidence. The two docket
record evi- entries relied upon by plaintiff as the record
dence. showing a judgment will be set out in full. They are as
follows:

Exhibit A.

Exemplification of the Record.

Commonwealth of Pennsylvania, Allegheny County—set.:

Among the records and proceedings of the court of common pleas No. 2, in and for county of Allegheny, and state of Pennsylvania, the following may be found as matter of file and record at No. 449, July term, 1905:

Appearance Docket Entry.

L. E. Lyon and M. F. Price, Copartners Doing Business under the Firm Name and Style of Lyon-Taylor Co. v. Rudolph Hardware Company, a Corporation. No. 449. May 18, 1905, summons in assumpsit to 1st Monday, June, 1905. Statement filed. Service of filing statement accepted June 1st, 1905, by deft.'s atty. Served May 22nd, 1905, on W. T. Poellot, one of the partners of defendant Co. June 13th, 1905, affidavit of defense filed. August 28th, 1905, rule on deft. for judgment for want of sufficient affidavit of defense; reasons filed. Eo die, service of rule accepted by deft.'s atty. September 8th, 1905, on argument list and rule discharged. September 19, 1905, plea and præcipe for issue filed. September 28, 1907, on motion the within supplemental affidavit of defense is ordered filed. Sept. 30, 1907, proof of service of notice of filing supplemental afft. of defense filed. February 13, 1908, on trial list and jury sworn. Eo die, verdict in favor of defendant and certify a balance in its favor for three hundred ninety-seven and 26/100 (\$397.26) dollars. August 24, 1908, shff.'s receipt for verdict fee filed and judgment entered on the verdict.

Judgment Docket Entries.

Defendant, Lyon-Taylor Co.; Plaintiff, Rudolph Hardware Co., a corporation; No. 449, term July, year 1905; date of judgment August 24, 1908; amount, \$397.26.

In addition are certified copies of certain documents which we do not deem it necessary to set out in full. These are a direction to the prothonotary by attorneys for plaintiff in that case to issue summons in assumpsit; statement of claims; præcipe for appearance; notice to file affidavit of defense; summons to defendant in that case; affidavit of defense by the president of the hardware company; notice of rule for judgment; plea of the hardware company; supplemental affidavit of defense of the hardware company, and notice thereof; and a verdict as follows:

Verdict.

And now, to wit, February 13th, 1908, we the jurors empannelled in the above-entitled case, find in favor of the defendant, and certify a balance in its favor for \$397.26.

....., Foreman.

Pittsburgh, August 24, 1908.

Allegheny County.

Also a receipt from the sheriff for verdict fee.

The question is whether this record shows a judgment against these defendants in the court of Pennsylvania. It is admitted by counsel for appellee that the judgment docket referred to in the record corresponds with our judgment docket and that the appearance docket referred to in the record corresponds with our combination docket, provided for in subdivision 6 of section 288 of the Code.

His contention is that, while subdivision 1 of section 288 requires the clerk to keep a book containing the entries of the proceedings of the court, which may be known as the "record book," it is not material what it is called; that the entries in the appearance docket in the exemplifications above set out, while made in the appearance docket, are the entries of the proceedings of the court, as provided in the section of the Code last cited; that this is the record and the best evidence of the rendition of the judgment. He relies on *Baxter v.*

Pritchard, 113 Iowa, 424; *Kennedy v. Bank*, 119 Iowa, 123; *Case v. Plato*, 54 Iowa, 64.

The first and last of these cases are also cited by appellant. The *Baxter* case holds that the record book is the best evidence of a judgment; and that it, or a certified copy thereof, is alone admissible to show judgment, when no foundation is laid for introducing secondary evidence. In *Kennedy's* case it was held that an abstract of the amount of a judgment entered upon the judgment docket does not constitute a judgment, and is not proper evidence thereof. We think *Case v. Plato*, *supra*, holds contrary to appellee's contention. After quoting the statutes, which were, for the purpose of this case, no different from the present statutes, the court there said: "It is apparent from the foregoing provisions that it is essential to the validity of a judgment that it should be entered upon the record book. This is the book in which a statement of the proceedings of the court is kept, and to which appeal must always be made to determine what has been done. The theory of the law is that it is kept under the direction and supervision of the judge; is approved by him and constitutes the only proof of his acts. The judgment docket is a mere abstract of the judgment, and it is contemplated that it shall be made up from a judgment previously entered in the record book."

The sections in the present Code bearing on this are 3784, 288 (paragraphs 1, 2, and 6), and 289. Section 3784 provides: "All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action." Paragraph 1 of section 288 refers to the record book; paragraph 2, judgment docket; and paragraph 6, to appearance docket. Paragraph 6 reads in part: ". . . But the entries provided for in this subdivision and subdivisions two and three may be combined in one book, indexed as provided in subdivision one hereof, which, when thus kept, shall be known as the 'combination docket.'" Under this, the appearance docket, judgment docket, and fee book may be combined in one book, but this does not include the record book required by paragraph 1 of

this section. All these books are records of the court in a sense and for some purposes, but none of these, except the one referred to in paragraph 1 of section 288, is the record of the proceedings of the court. Section 289 provides how the appearance docket shall be kept. Certain things are required by law to be entered in the appearance docket. The purpose is that this book is for the convenience of the officers and public, and to give a synopsis or brief history of the case.

It is clear that the copies of the appearance docket and the judgment docket of the Pennsylvania court offered in evidence in this case do not show a judgment against defendants; at most they are mere memoranda of the clerk or prothonotary, and not the action of the court, showing clearly what was done by the court.

The clerk should not, and, of course, ordinarily would not, note in the appearance docket that a judgment had been rendered until the record had been in fact written in the proper record book; but to hold that the rendition of a judgment may be shown by recitals of the clerk in his abstract of the record, entered in the appearance or judgment docket, would do away with the necessity for the record required by our statute.

As sustaining the views herein expressed see the following cases, in addition to those already cited: *Taylor v. Runyan*, 3 Iowa, 474; *Balm v. Nunn*, 63 Iowa, 641; *Callanan v. Votruba*, 104 Iowa, 672; *Updergraff v. Perry*, 4 Pa. 291.

Other matters of minor importance are argued by appellant. Some of these are that the record does not show that the jury was impaneled or sworn, and no record that instructions were given; that the verdict is not signed by the foreman of the jury; or that the judgment was signed by the judge. As to some of these, a presumption of regularity obtains; as to others the requirements are directory.

For the reasons given, the judgment is reversed. Plaintiff may be able to obtain additional evidence, so that the cause is remanded for a new trial.—*Reversed*.

LADD, C. J., and EVANS and WEAVER, JJ., concur.

G. H. WACHAL, Appellee, v. ROY DAVIS, C. C. HAND, Appellant.

Oral contracts: STATUTE OF FRAUDS: EVIDENCE. In this action upon
1 an oral agreement to sign certain promissory notes the evidence
tended to show that the defendant sought to be held liable was not
to become a surety for his co-defendant, but was seeking to pro-
mote his own interests, thus taking the oral promise out of the
statute of frauds: and a denial of this evidence by plaintiff
presented a conflict upon the question of whether the promise was
independent or collateral, which was for the jury to determine.

Evidence: COMPROMISE AND SETTLEMENT. Not all admissions made
2 during negotiations for the settlement of a controversy are to be
excluded as an offer of compromise. Where the evidence was com-
petent for other purposes, and there was no showing that the state-
ments would not have been made except for the purpose of effecting
a settlement, it is admissible.

Appeal from Buchanan District Court.—HON. F. C. PLATT,
Judge.

SATURDAY, MARCH 14, 1914.

ACTION at law upon an oral agreement by defendants to
sign three promissory notes for \$50 each, to be given to and
accepted by plaintiff in payment for a binder, and that
defendant Hand should become responsible therefor. It is
alleged that plaintiff relied solely upon the agreement of
Hand and let Davis have the machine. A further statement
of facts appears in the opinion. There was a judgment against
Davis by default; trial to a jury as to Hand, and a verdict
and judgment against him, from which he appeals.—*Affirmed.*

Cook & Cook, for appellant Hand.

Hasner & Hasner, for appellee.

PRESTON, J.—A further statement of facts, briefly stated, and which the jury could have found established by the evidence, is that during the year 1911 the defendant Davis was a tenant of the defendant Hand, both living on the same farm. The small grain on the farm was raised on shares. Appellant Hand had a mortgage on Davis' share of the grain and received at least a part, if not all, of the money received for the grain when it was sold. The plaintiff was in the agricultural implement business. On May 20, 1911, Davis went to the plaintiff and signed a written order for a binder. It seems that plaintiff was not willing to extend credit to Davis alone. By the terms of the order the binder was to be paid for by giving to plaintiff three approved notes for \$50 each, payable September 1, 1911, 1912, and 1913. Between the 4th and 7th of July, 1911, Davis and Hand came together to the plaintiff's place of business. Plaintiff was absent at the time, and W. H. Ossman was in charge of the business. Ossman told Hand that the plaintiff, Wachal, had instructed him not to let the machine go until he (Hand) had agreed to pay for it. Hand said, "My grain is ripe, and we must have the binder." Then Ossman told Hand that Wachal, the plaintiff, was away and had the notes to be signed with him, and that he (Ossman) had not been accustomed to fixing up the papers, and that, if Hand would agree to sign the notes, then they might have the binder. To this Hand replied that he surely would do so, that he was good for the binder, and that he would come in in a few days and fix it up, and Hand said that he would see that the binder would be paid for. Upon the strength of these statements, the binder was taken away by Hand and Davis. It was never paid for, and the defendant Hand refused to give his notes as orally agreed. Davis did not sign the notes. On the trial of the case the defendant Hand moved for a directed verdict, on the ground that the case made by the plaintiff was within the statute of frauds. The evidence was objected to on that ground. The question thus presented was whether there was evidence

in the case which would sustain a finding by the jury that the agreement by Hand was an original and independent undertaking, or made to subserve a purpose of his own. The court admitted the evidence and overruled the motion, holding that there was such evidence in the record, and that the case presented a question of fact for the jury. The jury found for the plaintiff.

It is not claimed that there was any error in the instructions of the court, and it must therefore be admitted that they correctly stated the law to the jury; provided there was

1. ORAL CONTRACT: statute of frauds: evidence. evidence in the case from which the jury might find that Hand made such direct and original promise to become primarily liable to the plaintiff, or that he did so to promote some object and interest of his own. It is the contention of appellant that a mere oral promise by defendant Hand to sign notes with his tenant, Davis, is a collateral undertaking and within the statute of frauds. If there was nothing more, there might be merit in his contention; but, from the foregoing statement of facts, appellant's claim does not quite cover the case. It is said by appellant that the debt was that of Davis, created when Davis gave the order in May, but that the order was on certain terms, which had not been complied with by Davis. Plaintiff refused to complete the sale until that was done. Plaintiff refused to extend credit to Davis alone. Defendant himself testified as a witness that Ossman "did not seem to want to do business with Mr. Davis." Under the evidence, it was a fair question for the jury whether the credit was given to Hand. If it was, then it was not a collateral undertaking, but original, and not within the statute. Appellant concedes this to be the rule.

Furthermore, it is contended by appellee, and we think his claim is correct, that there was evidence from which the jury may have found that the leading object of Hand was not to become surety for Davis, but to promote or subserve his own interest, and that therefore his oral promise to pay is

not within the statute. *Frohardt v. Duff*, 156 Iowa, 144. The evidence tending to so show has been before referred to. True, defendant denied plaintiff's evidence on this subject and claimed he was to sign the notes only on condition that he was secured, and that this had not been done. If the evidence is in conflict as to whether the promise is independent or collateral, the question is for the jury. *Frohardt v. Duff, supra*. This disposes of the principal contention in the case.

2. EVIDENCE: compromise and settlement. In October, 1911, plaintiff and another went to see Hand and asked him to sign the notes or pay for the machine. They testified, over objection, that Hand requested plaintiff to take the binder back at \$100, so he (Hand) would not have to pay so much. Defendant's version of this is: "I never bought this machine. I do not know as I asked him to take it back. I asked him if he would take it back and allow \$100." It is said by appellant this was incompetent because an offer of settlement or compromise. Defendant did not offer to return the machine. Under his theory he could not do so, because he claimed it belonged to Davis.

It is doubtful whether the statement was such an offer of compromise as that it should have been excluded. Not all admissions made during negotiations of settlement are excluded. Admissions of distinct facts during such negotiations have been held to be proper. There is nothing in the evidence to show that the statement of defendant would not have been made except for the purpose of the negotiations, or that it was made by defendant for the purpose of buying his peace. Jones, Evidence (Pocket Ed.) section 291; *Kennell v. Boyer*, 144 Iowa, 303; *Houdeck v. Insurance Co.*, 102 Iowa, 303-308.

But aside from this, when the evidence was received, it did not appear that the statement was made by defendant while plaintiff was trying to secure the signature of defendant to the notes, or pay for the machine; or, as defendant claims, in the attempted settlement. That objection was made, and later a proper motion to exclude; which was denied. The

trial judge may have changed his mind and instructed the jury to disregard such evidence. The instructions do not appear in the record. The presumptions are in favor of the judgment, and error must affirmatively appear.

We find no error, and the judgment is—*Affirmed*.

LADD, C. J., and EVANS and WEAVER, JJ., concur.

FRANK M. HENRY, Appellee, v. JOHN JONS, ET AL.,
Appellants.

Building contracts: PERFORMANCE: ACCEPTANCE: PAYMENT. Where
1 there has been substantial performance of a builder's contract the owner cannot avoid liability for payment of the contractor by a mere refusal to accept the building upon its completion.

Same. Where a building contract required the owner to pay the stipulated
2 installments as the work progressed, with final payment upon completion and acceptance by the owner and architect, without regard to the architect's estimates or certificates, upon substantial completion of the contract the owner cannot plead failure of either himself or the architect to express approval of the building, in defense to a suit for the contract price.

Appeal from Boone District Court.—HON. C. G. LEE, Judge.

SATURDAY, MARCH 14, 1914.

ACTION in equity to recover amount alleged to be due on a building contract, and to foreclose a mechanic's lien. Decree for plaintiff, and defendant appeals.—*Affirmed*.

F. W. Ganoë, for appellants.

Whitaker & Snell, for appellees.

PER CURIAM.—The plaintiff, a building contractor, entered into an agreement with defendant to furnish the

material and construct a two-story garage on a lot owned by the latter for the agreed price of \$4,695. He alleges that he has performed his agreement in the construction of said building, and at the request of the defendant did other and extra work thereon to the value of \$102.83, and that of the amount so earned by him the sum of \$1,498.83 remains due and unpaid for which he demands a recovery and the enforcement of his lien therefor. The defendant admits the contract, but denies performance thereof by plaintiff, and denies that the work has ever been approved or accepted by himself and the architect. He also pleads several counterclaims for damages on account of inferior work and inferior materials, and for delay in completing the building. Certain payments are averred to have been made to plaintiff and upon his orders, and a recovery is demanded upon said counterclaims to the amount of \$1,861.90. The trial court found for plaintiff for \$521.85, and established his lien as provided by statute.

I. As is usual in this class of cases the controversy involves many disputed questions of fact, upon most of which the trial court found against the defendant. We shall not go into any statement or discussion of the testimony upon these issues. They present no features of general interest or value to the profession, and their decision, depending as it does upon the particular circumstances of this individual case, is of no value as a precedent. We will only say that upon a reading of the record we conclude the findings of the trial court in this respect are fairly sustained, and we discover no good reason for overruling them.

II. Counsel for defendant devotes a considerable part of his argument to the proposition that plaintiff, having sued upon a contract, must show a substantial performance on his

part in order to recover. As to what constitutes substantial performance the position of defendant is stated as follows: "Substantial performance permits only such omissions or deviations from the contract as are inadvertent or *uninten-*

1. BUILDING CONTRACTS: performance: acceptance: payment.

tional, or not due to fraud, do not impair the structure as a whole, are remedial without doing material damage to other parts of the building in tearing down and reconstructing, and may, without injustice, be compensated for by deductions from the contract price." This statement of law and definition of performance may be accepted as correct for the purposes of this case, but the fact as to the alleged material defects in the building and material variations from the provisions of the contract having been found against the defendant, then, upon defendant's own conception of the law, the result announced by the trial court works no violation thereof.

III. The most plausible ground of appeal is upon the defense that the building has never been accepted or approved in accordance with the provision of the contract which makes the final installment of the contract price payable at the completion of the entire building if the same is accepted by the architect and the defendant. So far as an acceptance by the defendant himself is concerned, we think if the work is shown to have been done in substantial compliance with the agreement (which we have already held to be established by the evidence), he cannot avoid payment by saying that he refuses to approve or accept the building. The only formal or written notice to the plaintiff of a refusal to approve the work was given by the defendant alone. The architect as a witness on the trial, while criticising the work done in several respects, does not testify that he ever refused, or now refuses, to accept the completed job. The entire record of his evidence on this point is as follows: "Q. Did you ever accept this building as being complete in compliance with the plans and specifications? A. No." This denial is a mere argumentative conclusion, nor does it negative a substantial compliance. The precedents relied upon by the appellant are of the familiar class, where the contractor agrees to accept payment for his work only upon the estimates or certificate of an engineer or architect, an agreement which we have held to be valid and binding. Under such contract it has also been held that these

estimates are the measure of the contractor's right of recovery. *Mitchell v. Kavanaugh*, 38 Iowa, 286; *Trust Co. v. Gibson*, 145 Fed. 871 (76 C. C. A. 155, 7 Ann. Cas. 522); *Miller v. R. R. Co.*, 132 Iowa, 412; *McNamara v. Harrison*, 81 Iowa, 486; *Edwards v. Louisa County*, 89 Iowa, 499.

The authority of these decisions and their application to all cases of like character will not be questioned, but the contract now before us is not of that kind. It nowhere re-

quires the contractor to receive payment upon
2. SAME.

the architect's estimate or certificate, but there is an absolute undertaking by defendant to pay the stipulated installments according to the stage or progress of the work; no mention being made of the architect except the reference to his "acceptance" when the work was completed. Nor is there any provision by which the architect is given authority to act as arbiter of any differences arising between the contractor and owner, or to determine what damages, if any, either party may sustain because of any failure of the other to observe the conditions of the contract. Nor is there any requirement of any certificate of approval or acceptance by such architect. Under these circumstances, it appearing that the job has been completed substantially as agreed, we have to repeat that the owner may not plead either his own or the architect's failure to express approval thereof as a defense to an action for the contract price. All parties are required to act in good faith, and a more captious refusal to express an acceptance of a job which is proved to have been done in accordance with the contract therefore will not be allowed to prevent a recovery. The evidence discloses that the architect is himself a building contractor, and was competing bidder for this work, and, while we would not be justified in finding that he acted in conscious bad faith in this transaction, it is not uncharitable to recognize the possibility that the circumstance to which we refer tended to make him less appreciative of the merits of plaintiff's performance of the contract than he otherwise might have been.

The trial court appears to have reached an equitable result, and its decree is—*Affirmed*. All the Justices concurring.

WILMA L. LYON, Appellant, v. BELLE BRADFIELD, Appellee.

Real property: CONTRACT OF SALE: PERFORMANCE: QUIETING TITLE: EVIDENCE. Defendant purchased a tract of land upon the representations of plaintiff and his agent, and under the mistaken belief, that it contained certain land with timber thereon. It was subsequently agreed in settlement of the dispute that plaintiff should convey the strip in controversy, provided defendant found a purchaser for the balance of the tract. This defendant did but plaintiff refused to perform unless a mistake in the price was rectified. Defendant then tendered the balance of the purchase price according to the contract, which was refused. *Held*, to warrant a finding that plaintiff agreed to convey the disputed tract to defendant, in consideration for the settlement and the finding of a purchaser for the remainder of the tract, and to show sufficient performance by defendant to warrant a decree quieting the title to the tract in dispute.

Appeal from Polk District Court.—HON. W. H. MCHENRY, Judge.

SATURDAY, MARCH 14, 1914.

ACTION in equity to enforce forfeiture of contract for the purchase of real estate: Counterclaim by defendant against plaintiff to establish and quiet her title to a part of the same lands. On trial to the court plaintiff's bill was dismissed in part and decree entered as prayed by defendant. Plaintiff appeals.—*Affirmed*.

Read & Read, for appellants.

Miller & Wallingford, for appellee.

WEAVER, J.—Plaintiff, owning a tract of land some twelve or thirteen acres in extent, sold the north five acres to the de-

fendant. Some time after said sale, the plaintiff alleges, she entered into another executory written contract with the defendant Belle Bradfield and Marion Eppard to sell to them the remainder of said tract for the sum of \$1,700, payable \$50 down and \$25 per month thereafter until the whole principal debt with interest at 6 per cent. should be discharged. The land was described by location and its length and breadth stated in feet and fractions of a foot. The petition then avers the failure of said purchasers to pay the accruing installments of the purchase price and that due notice of forfeiture was served on the said Belle Bradfield more than thirty days before the bringing of this action. Eppard was not served and does not appear to the action. The petition further alleges that upon the making of said contract Belle Bradfield took possession of the land so sold and has continued therein. Upon these allegations it is prayed that the contract be declared forfeited and plaintiff's title quieted. The defendant denies that she was a party to said written contract, but alleges the fact to be that Eppard made the contract with plaintiff and endeavored to perform and would have performed his part thereof, but that plaintiff, though tendered payment of said installments as they fell due, refused to accept or receive the same, and, if the terms of said agreement have never been carried out, it is solely because of the refusal of the plaintiff to permit the purchaser to do so. She admits that at or about the date of said contract she took possession of the north ninety-six feet of said land and has since maintained the same, but denies that she ever took possession of the remainder of said tract or ever laid any claim thereto. She does, however, insist that the ninety-six feet of land above referred to is her own property. The nature and history of her claim is as follows: When she was negotiating for the purchase of the lot on the north end of the original tract, she examined the premises and found thereon a desirable grove of trees and proposed to buy the north five acres if it included said grove, and plaintiff's agent having charge of the transac-

tion represented to and assured her that the grove would be in fact included in such purchase, and thereupon, the land not having yet been platted or surveyed and the precise location of the line not yet being known, she entered into a written contract for the purchase of the said north five acres, which contract expressly described the land bought as "five acres with grove." On measuring it, however, it was found that, in order to include the grove in her purchase, the partition line should be carried ninety-six feet farther to the south. Thereupon, she says, a controversy arose between her and plaintiff over her claim of right to have the line moved to the south sufficiently to include the grove in her purchase, and for the purpose of adjusting or settling the same the plaintiff, after some controversy, offered and agreed that he would yield and convey said strip of land to defendant if she would find a purchaser for the remainder of the unsold tract on satisfactory terms. She further claims that she accepted the offer and did find and produce to plaintiff the said Eppard as a purchaser who was accepted, and entered into a valid contract to purchase said tract and endeavored in good faith to carry it out, being prevented only by the refusal of plaintiff to permit Eppard to do so. Having thus performed her agreement, she took possession of said ninety-six feet and has since claimed, used, and possessed it as her own. She asks therefore that her right to the ownership of this land be confirmed and her title quieted. Plaintiff denies all the affirmative matter in the answer and said counterclaim.

It will be seen that the final question of fact is: Did the plaintiff, in consideration of a settlement of defendant's claim growing out of the original purchase and of the finding of a purchaser for the remainder of the tract, agree to yield and convey to defendant the ninety-six foot strip? This inquiry being once determined, the remaining fact issues are not difficult of solution. That up to the date of the contract in suit defendant was claiming that the south line of her original purchase should be located ninety-six feet south of where the

survey placed it is hardly open to serious denial. It is shown without substantial dispute that the inclusion of the grove in her purchase was a moving consideration in her mind for buying the first lot. She so said to the agent soliciting her to buy, and he assured her that her purchase would include it. She took at least two of her friends to view it, and in their presence discussed the matter with plaintiff's agent and talked about getting the grove. When the written memorandum of sale was signed by the agent, she insisted that specific mention be made of the grove, and this was done, describing the land as the "north five acres with grove." Immediately thereafter she secured the consent of the tenant in possession to yield it to her. Later, after the contract was made and part of the purchase price paid, a survey resulted in placing a large part of the grove south of her line. It would be hardly possible for a man, and quite impossible for a woman, to submit to such disappointment with equanimity, and we can readily believe that defendant protested to plaintiff or to her husband, who had immediate charge of the business and insisted that the ninety-six feet of land necessary to give her the grove rightfully belonged to her. Nor is her story unreasonable that plaintiff's representative—her husband—recognizing some merits in defendant's claim and to have done with her complaints, finally consented to yield to her the additional strip of land in settlement of the dispute if as further consideration she would find a purchaser for the rest of the land. While plaintiff's husband denies this, we think the preponderance of probabilities is with the defendant, and that her theory of the transaction finds material corroboration in the fact that the very writing sued upon contains the stipulation that when the terms of the contract should be performed plaintiff would deed this ninety-six feet to Belle Bradfield and the remainder of the tract to Eppard, the purchaser whom she claims to have produced.

If then the failure to carry out the contract for the sale of the remainder of the land is chargeable to the plaintiff, the

court below made no mistake in sustaining defendant's counterclaim. Indeed, if the alleged agreement of settlement in which she was to find a purchaser for the remainder of the tract had never been made, and defendant had rested her claim solely upon her original purchase and the facts as hereinbefore recited respecting the same, the court might well have held her entitled to the same relief. But turning to the facts as to the performance or failure to perform the contract in suit, it is shown without substantial controversy that, soon after the writing had been executed, plaintiff's husband demanded that a change be made therein because of an alleged mistake in computation of the purchase price, and that it should be corrected by increasing such price beyond the sum stated in the writing. This demand being denied, he adopted the plan of refusing to receive payment of the installments as they fell due from month to month. Eppard being in the employ of the defendant, she, at his request, continued to tender payment of the accruing installments as they fell due, and both plaintiff and her husband as persistently refused to accept them, unless the alleged mistake was rectified. At the end of some seven or eight months, Eppard, having become discouraged or disgusted over the matter, abandoned further effort. At one place in his testimony Mr. Lyons says the payments were refused because they were tendered to be applied on the purchase of the ninety-six foot strip and not on the contract generally. In this, however, he is clearly mistaken, as most of the tenders were made in writing and clearly specify that the payments were offered upon the contract as written. Indeed, Lyons himself testifies that he informed defendant he "was not disposed to carry out the contract unless the mistake was rectified." There is no evidence tending in any manner to show that the purchase of the larger tract was not made in good faith or would not have been carried to completion according to its terms except for plaintiff's repeated and positive refusal to proceed with it. Such being the case, it follows that defendant must be held to have duly performed

her part of the agreement, and that she was entitled to have her right in the land claimed by her established by the court as is done in the decree.

We have given no special consideration to the question whether defendant did or did not sign the writing. We think it not a matter of controlling importance. It is perfectly clear—indeed, the contract itself tends to sustain that conclusion—that the only interest of the defendant in the transaction was to secure to herself the ninety-six foot strip of land; the remainder to be conveyed to Eppard. If we were to find that she did sign the paper, it would have to be held that her relation to Eppard and his purchase of the larger tract of land was that of surety only, and her signature, if proved or admitted, would not affect the merit of her claim against the plaintiff.

The case has some peculiar features, and they are not all on one side of the controversy; but we believe the decree below works substantial equity between the parties and, it is therefore—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

H. M. GITTINGS, Appellant, v. ROBERT DUNCAN, Appellee.

Appeal: VERDICT UPON CONFLICTING EVIDENCE. The verdict of a jury
1 rendered upon conflicting evidence is conclusive of the issue on appeal.

Same: REJECTED EVIDENCE: NECESSITY FOR OFFER OF PROOF. Error
2 for the rejection of evidence cannot be urged on appeal, in the absence of anything in the record to show what the testimony of the witness would have been if received.

Negotiable instruments: INTOXICATION AS A DEFENSE: SUBMISSION OF
3 ISSUE. Where defendant pleaded in defense to a suit on his note that he did not intend to execute the same, that it was procured by fraud and at a time when he was under the influence of liquor,

evidence that he had been drinking heavily on the day the note was executed was sufficient to take the issue tendered by the answer to the jury.

Appeal from Boone District Court.—HON. R. M. WRIGHT,
Judge.

SATURDAY, MARCH 14, 1914.

ACTION at law upon a promissory note. Verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

F. W. Ganoë, for appellant.

D. G. Baker, for appellee.

WEAVER, J.—The note in suit bears date May 1, 1910, and purports to be the promise of the defendant Duncan to pay to the order of M. V. Kimler one day after date the sum of \$1,000 with interest. The plaintiff alleges that said note was indorsed to him by the payee after maturity and that the same is due and wholly unpaid. For answer to plaintiff's claim, the defendant admits that he signed the paper sued upon, but denies that he is in any manner liable for the payment of the amount thereof. He alleges the fact to be that he and T. W. Kimler, the husband of the said M. V. Kimler, entered into a partnership for the purchase and operation of a liquor saloon at Albert Lea, Minn.; but because of the fact that said Kimler was indebted to a considerable extent he desired to occupy the relation of a secret or silent partner, and that he be known to the public as an employee in the business and not one of the proprietors. In pursuance of this agreement, defendant further alleges that Kimler did put into the business the sum of \$1,000 against an equal or larger sum contributed by the defendant. Some two or three months later, according to defendant, Kimler asked him to execute some paper which would

1. APPEAL: verdict upon conflicting evidence.

show his rights in the business and property in the event of death or other casualty to either party, and, defendant consenting to do so, Kimler drew up a paper which he signed without reading, supposing it to be a simple acknowledgment of the facts with respect to the business and himself put it in the safe in the office of the saloon, where it could be procured should it be needed. He explains his failure to read the paper or to understand its real nature by the statement that he had that day drunk a large quantity of intoxicating liquor which had to some greater or less extent disabled him to understand or appreciate the nature of his act. He avers, however, and swears as a witness, that he never had any business dealings with M. V. Kimler, the payee named in the note, never gave her a note in any amount, and was never indebted to her in any sum. He assumes that the paper in suit was the one signed by him as above stated, but that he did not know or understand that he was giving a note and did not know that it contained the name of M. V. Kimler. He further alleges and testifies that he was in no manner indebted to T. W. Kimler and never undertook or promised to repay to him the money which Kimler had put into the business. On the part of plaintiff, Kimler testifies that, defendant desiring to borrow money, he (Kimler) obtained \$1,000 from his wife and delivered it to defendant, and that the note in suit was given to evidence the indebtedness so contracted. He also says that defendant was then quite sober. Mrs. Kimler, the payee in the note, testifies that she gave the money to her husband to lend to defendant and that he afterward delivered the note to her. The claim of defendant that Kimler was a partner in the purchase and operation of the saloon finds material corroboration in the testimony of the person from whom the business was purchased. In other respects the truth of the controversy is to be found, if at all, from the conflicting testimony given by the defendant on the one hand and Kimler on the other. In short, the decisive issues of fact were peculiarly matters for the consideration of the jury. It follows that

the verdict returned upon the trial must be held conclusive and the judgment below sustained unless some prejudicial error appears in the record of the trial.

But one error is assigned upon matters of evidence. Referring to a time when defendant was making some return or report to the Internal Revenue Department, plaintiff's

2. **SAME:** rejected evidence: necessity for offer of proof. counsel asked the witness, "Do you know whether or not Robert Duncan made a sworn statement as to who owned that business at

that time?" Answer to this question was excluded upon defendant's objection. It is a sufficient reason for overruling the assignment of error, upon the rejection of this evidence, that counsel did not in any manner state or reveal what he expected to show by the witness. For all that appears the witness might have answered that he did not know. To take advantage of such a ruling there should be some showing or offer of the matter to which the witness will testify if permitted.

It is further argued that the court erred in submitting the defense of intoxication to the jury because it is said there was no evidence on which the jury could find for defendant

3. **NEGOTIABLE INSTRUMENTS:** intoxication as a defense: submission of issue. upon that issue. We are not prepared to so hold. Defendant does testify to having consumed a very large quantity of liquor on

that day, and, while the effect upon him appears not to have been so great as to deprive him of his faculty of memory, we think the jury could well have found that his condition was such that he did not or could not know the real nature and effect of the paper he signed.

Other objections made to the charge of the court are argumentative in character and raise questions which might properly be urged to the jury upon the submission of the case, but do not constitute grounds upon which the court was authorized to control the jury's action in the premises.

Counsel for plaintiff make a strong and plausible argument from the evidence that defendant's claim of intoxication

ought not to be sustained, and that his testimony as to the alleged partnership and concerning the real nature of the transaction in which the money was paid or invested is not worthy of belief; but, finding as we do that there was enough to carry these issues to the jury, the weight, value, and effect of the testimony were matters for the consideration of the triers of fact, and the court is not authorized to control their findings.

We have read the record with care and find no reason for ordering a new trial. The judgment of the district court is therefore affirmed. Costs in this court will be taxed to appellant except the cost of printing the so-called "Appellee's Explanation of Denial," which will be taxed to the appellee.—*Affirmed.*

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

MARY E. WITHEY, Appellee, v. THE FOWLER COMPANY,
Appellant.

Evidence: LEADING QUESTIONS. Where the cross-examination of plain-
1 tiff, suing for injuries received while riding in an automobile,
suggested or assumed that she was riding under some arrangement
or agreement with the other occupants of the car, it was proper for
her to state on redirect examination how it was she happened to go
riding at that time, and who asked her; as the inquiry was material
on the question of whether she was a guest, or the owner or driver
of the car.

Same: LEADING QUESTIONS: DISCRETION: EVIDENCE. To justify the
2 reversal of a cause because of the overruling of objections to lead-
ing questions there must be a clear abuse of the court's discretion
in so doing and an apparent prejudice of the rights of the parties.
In the instant case no prejudice appears.

Personal injury: MARRIED WOMEN: DAMAGES: LOSS OF EARNING
3 CAPACITY. Marriage does not deprive a woman of her right to
pursue an independent occupation, and she may recover for injuries

depriving her of her earning power in such occupation; and the fact that she may not be engaged in such pursuit at the time of the injury, or may have abandoned the same, will only affect the amount of her recovery.

Municipal corporations: ORDINANCES: SUBJECT: TITLE. An ordinance
4 regulating vehicles when upon the streets, whether in use or left standing, and also providing how they shall be driven and where they shall be placed when standing, and another section dealing with street obstructions, is not objectionable as embracing more than one subject; and the subject treated is sufficiently expressed by the title, "An ordinance governing and regulating traffic on the streets."

Evidence: EXPERT OPINION. The distance in which a loaded truck
5 could be stopped when hauled along a substantially level paved street is a matter concerning which an experienced driver may give his opinion in evidence. In the instant case the evidence is held to show that the street at the point where the truck struck the automobile, causing plaintiff's injury, was practically level.

Evidence: EXAMINATION OF WITNESSES. Where no attempt is made to
6 impeach a witness, it is not proper in the examination of another witness to put into his mouth the answer sought, concerning what the former said as a witness in another proceeding relating to the same matter.

Evidence: SCOPE OF CROSS-EXAMINATION. Where one who witnessed
7 the collision of a truck with an automobile had described the movements of each and stated that he anticipated the collision, it was not prejudicial to ask him on cross-examination if he anticipated that the driver of the truck would turn sharply across the traveled way without looking to see if any one was approaching, although the anticipations of the witness were not material and might well have been omitted.

New trial: MISCONDUCT OF COUNSEL. The remark of counsel, in ob-
8 jecting to a question as leading, "Why can't he ask him what he did? There is only one reason and that is he wants to tell the witness as near as he can," was not prejudicial misconduct.

Municipal corporations: ORDINANCES: CONSTRUCTION OF TERM "ALLEY."
9 A private alley connecting with the street and used for driving to and from the street, is an alley connected with the street, within the meaning of an ordinance defining the manner in which vehicles shall pass from the street into an intersecting alley.

Negligence: AUTOMOBILE ACCIDENT: CONTRIBUTORY NEGLIGENCE. The
10 fact that plaintiff, as she saw the truck approaching the automobile
in which she was riding, realized the danger of a collision and
put out her hand and motioned the driver of the truck to stop, when
the tongue of the truck struck her hand accidentally, or that she put
out her hand because of her instinctive movement to ward off the col-
lision, did not render her guilty of negligence as a matter of law.

Same: IMPUTED NEGLIGENCE. The negligence of the driver of an
11 automobile cannot be imputed to one riding with him simply as an
invited guest, in no manner responsible for the course of the ma-
chine and assuming no control over the driver. To charge one
occupying a car with the negligence of the driver there must be
some other relation between them than that of mere host and guest;
and the mere fact that both have engaged in a drive for mutual
pleasure does not materially alter the situation.

Instructions: REFUSAL OF REQUESTS. It is not error to refuse to give
12 instructions which are sufficiently covered by those given by the
court; nor to refuse to give those stating mere abstract legal
propositions, without suggesting their proper application to the case.

Same. Where the court gave a requested instruction sufficiently cover-
13 ing the point, refusal to incumber the instructions by repetitions of
the same thought in different form was not erroneous.

*Appeal from Black Hawk District Court.—HON. ROBERT BON-
SON, Judge.*

SATURDAY, MARCH 14, 1914.

ACTION at law to recover damages for personal injury.
Verdict and judgment for plaintiff, and defendant appeals.—
Affirmed.

Mears & Lovejoy, for appellant.

Edwards, Longley & Ransier, for appellee.

WEAVER, J.—The course of Lafayette street in Waterloo,
Iowa, is from northwest to southeast. It is crossed at right
angles by Fourth street. About one hundred feet south of

the intersection with Fourth street a sixteen-foot alley opens upon Lafayette. The alley is a private one, maintained for the convenience of the defendant in hauling goods to and from its wholesale warehouse. Lafayette street is paved, is fifty feet wide between curbs, and is bordered on either side by a fifteen-foot sidewalk. A street car track occupies the middle of the paved way. The immediate circumstances attending the accident, so far as they appear to be without material dispute, are as follows: One of defendant's employees with a truck load of goods was driving along the middle of Lafayette street from Fourth street in the direction of the alley. The truck was constructed with low front wheels which would turn under the body of the vehicle. It weighed two tons, and was carrying a load of about five and one-half tons. As this load was moving down the street in the direction of the alley one Loomer, driving an automobile, in the rear seat of which the plaintiff, with others, was riding as an invited guest, turned into Lafayette street from Fourth, along the curb on the right. As the automobile moved at a more rapid pace than the truck, the former had evidently gained on the latter, and was about to pass it when the truck was swung to the right, with the purpose of entering the alley. The automobile in its course near the curb had nearly crossed the alley opening when the heavy truck came into contact with the car, the end of the projecting tongue of the truck crushing the hand of the plaintiff against the body of the car and inflicting a very serious injury. Recovery of damages is sought on the theory that the injury was occasioned by the negligence of the defendant's driver in that he did not exercise reasonable care in the driving and management of the truck. Negligence is further charged in that the driver failed to obey an ordinance of the city, requiring all vehicles to be driven upon the right-hand side of the street upon which they are moving, and, upon turning to the right into an intersecting street, avenue, or alley, such turn shall be made as near as possible to the right-

hand curb. Negligence is also charged because of defendant's failure to have its truck equipped with a brake. The claim of the plaintiff is put in issue by a denial of all the allegations of the petition.

The errors assigned are quite numerous and we shall attempt consideration only of such as counsel have thought of sufficient importance to make the subject of argument, and in so doing shall follow as near as practicable the order of their presentation in the brief.

I. Objection was interposed by defendant to certain questions asked plaintiff by her counsel, on the ground that they were leading and suggestive of the answer desired. The particular incident to which this criticism is directed is the following: After plaintiff had been cross-examined on the part of the defense her counsel addressed to her an interrogatory as follows: "Q. Mr. Lovejoy has repeatedly suggested in his questions, or assumed, rather, in his questions, that you went riding on this morning by virtue of some arrangement or agreement between the four of you. I will ask you to state now to the jury just how it was that you happened to go riding that morning. Who asked you, if anybody did, and just how it happened?" To this the defendant objected as leading and suggestive, and that the language of counsel was improper and not a correct statement of the facts concerning the cross-examination. The objection was overruled, and the witness answered, in substance, that she was riding at the time of the injury in Mr. Loomer's car upon his invitation, extended to her and other friends to drive about and see the city, and that she did not in any way control or direct the movement or course of the car. Aside from the statement with which it was prefaced the question appears to have been entirely unobjectionable. It was a material inquiry whether plaintiff was a mere guest of Loomer in the car, having no control over its management, or was the owner or hirer thereof, and the question was fairly framed to develop the fact.

It may be conceded that ordinarily counsel should not put a construction of his own upon the course of the cross-examination and embody it in a statement to the witness on

2. **SAME**: leading questions: discretion: evidence. redirect examination, but we are wholly unable to discover here the possibility of any prejudice therefrom. The fact that plaintiff was the guest of Loomer in the car, was riding upon his invitation as a mere matter of pleasure or diversion, and without any agency in the management of the vehicle, was in no manner disputed upon the trial. That this court may, upon a sufficient record, reverse the judgment of a trial court for error in overruling objections to leading questions may be admitted, but the general rule is otherwise. To justify a reversal on such grounds requires a clear showing of abuse of discretion and apparent material prejudice to the rights of the objecting party. *State v. Bodekee*, 34 Iowa, 520; *State v. Moelchen*, 53 Iowa, 310; *Hall v. Bank*, 55 Iowa, 612; *Reddin v. Gates*, 52 Iowa, 214; *Hilton v. Mason*, 92 Ind. 157.

II. In her petition plaintiff alleged, among other things, that she was a musician and teacher of music by profession, and that the injury to her hand had so crippled it as to

3. **PERSONAL INJURY**: married women: damages: loss of earning capacity. prevent her use of the piano and destroyed her ability to teach the use of the instrument. On her examination as a witness she testified that she had been married about twenty-four

years; that she had continued her occupation as a music teacher down to a period about six years prior to her injury, during which period she had given no lessons. She also said that prior to her injury she frequently played the piano as a matter of entertainment and on public occasions. She was then asked by her counsel to what extent, if any, the injury to her hand would affect her ability to teach piano and organ playing in the future should she desire to do so, and, over the objection of the defendant, she was allowed to answer, "It would hinder me in this way: That I have to execute and show the pupil many times how to do the piece. It helps them greatly in

their lessons, and I could not do it with the left hand." In support of the exception to this ruling and evidence it is argued that, in view of the conceded fact that plaintiff was a married woman, and had not been teaching for several years prior to her injury it should be held that she was not a music teacher in such sense that she could recover damages for being deprived of her power to earn money in such occupation. Further pressing this proposition upon the court's attention, the defendant, in submitting the case, asked the court to charge the jury as follows: "The plaintiff cannot recover in this action for any loss of earning capacity by reason of her inability to play the piano and give music lessons. There is no evidence in this case upon which to base any claim for damages in respect to the loss of earning capacity of the plaintiff, and in estimating the amount of damages, if any, the plaintiff may recover, you will wholly disregard any evidence that has been given in the case regarding the amount of her earnings, if any, as a music teacher, and you will award no damages to the plaintiff on account of any independent occupation of her own." The request was refused. It is earnestly contended for the defendant that, as plaintiff was not teaching music at the time of her injury, and had not been so engaged for several years, and there was no showing of a definite purpose to resume such occupation, the fact of her skill, capacity, and attainments in her profession was wholly immaterial, and entitled to no weight or value in estimating the damages she sustained by her injury. This we think is not the law. That under the law of this state a married woman may pursue an independent business or employment and have, enjoy, and control the fruits thereof, and if negligently killed or injured damages may be recovered by her, or her administrator, with reference to her individual skill and capacity in her separate occupation is of course too well settled to admit of dispute. *Niemeyer v. R. R. Co.*, 143 Iowa, 129; *Fleming v. Shenandoah*, 67 Iowa, 505; *Bailey v.*

Centerville, 108 Iowa, 25. To this extent the right of a married woman is not affected by her marriage relations.

It has been held, and upon unimpeachable grounds, that a man's education, training, skill, and capacity to earn money is a proper subject of consideration in estimating damages for his physical injury or death even though he is not in actual employment at the time of his death, or even if he has retired therefrom with no present intention of resuming it. *Simonson v. R. R. Co.*, 49 Iowa, 90. In other words there is value in a man's power or capacity to earn money. *Railroad Company v. Ward* (Ky.), 44 S. W. 1112. His natural and acquired power, skill and capacity to earn money, are in a very proper sense his capital. Its value may be lessened, but is not necessarily wholly eliminated because not employed. The same is true of a woman, except so far as it may be affected by her marriage. Marriage, as we have seen, does not take away her right to pursue an independent occupation. If she suspends or abandons such occupation, and devotes her energies to domestic duties alone, then, except for the effect of a recent statute, loss of time and loss of power and capacity to perform such domestic service would afford her no ground for the recovery of damages; the right of action resting in her husband alone. It happens, however, that chapter 163 of the Laws of the Thirty-fourth General Assembly, which went into effect very shortly before the accident in this case, grants to a married woman the right, among other things, to recover for her loss of time resulting from any injury caused by the negligence or wrongful act of another. Whether this is to be construed as authorizing recovery by her for the loss of earning power in the performance of domestic duties we need not now determine, for, taking the law as it stood prior to this enactment, we think the contention of defendant is not sustainable. When a married woman, after years of employment in an independent occupation, lays it aside for domestic duties even though she has no present intention of returning thereto, there is no presumption of law that she will never resume such

occupation. The future is an unopened book. She may, if she so elects, return to such occupation at any time. Misfortune, widowhood, disability of other members of her family may cast upon her the burden of supporting herself and others. Under such circumstances the occupation in which she has been trained, the skill and capacity developed by her in an independent employment, may constitute an asset or resource of scarcely less value than a bank deposit. True, in estimating damages resulting to her and her estate the fact, if it so be, that she had laid aside her independent employment, with no present intention of resuming it, is a material consideration in determining the damages, if any, which may be recovered. In other words, if she or her estate is found entitled to recover, then the amount of damages, so far as they are affected by her skill, ability, or capacity for independent employment, will be less in proportion to the probability that she would never have made use thereof even had the accident not occurred. Stated in other terms, the fact of a woman's ability and capacity in a skilled employment is always admissible in this class of cases, but the circumstance that she has quit the same, the length of time since she abandoned it, whether such abandonment was intended to be permanent, and the possibility or probability that she may or may not resume the same, are all proper to be considered upon the question of damages.

It follows that there was no error in overruling the defendant's objection to testimony, or the denial of the requested instruction based on the theory that such evidence was wholly inadmissible.

III. Plaintiff pleaded an ordinance of the city of Waterloo relating to the use of its streets, and offered the same in evidence. The ordinance is entitled "An ordinance governing and regulating traffic on the streets of Waterloo, Iowa." By section 2, which is the only part of said ordinance here in question, it is provided, among other things, that persons driving vehicles

4. MUNICIPAL CORPORATIONS:
ordinances:
subject: title.

upon any street shall keep to the right-hand side of such street, and that all vehicles shall, upon turning to the right into an intersecting street or alley, pass and turn as near to the right-hand curb as possible. To the offer of this record the defendant objected: First, because it has no application to the facts of this case, it appearing that defendant's truck at the time of the collision was entering by a private way upon defendant's private property, and the terms of the ordinance have no application to a use of the public street and private alley; second, because the ordinance is void, as being unreasonable, uncertain, and indefinite, and, if applied to the facts of this case, it constitutes an illegal attempt to regulate and restrict the defendant's right of ingress and egress between its private property and the adjoining street; third, because the ordinance contains more than one subject, and was passed in violation of Code, section 681; fourth, because neither the subject nor the provisions of said ordinance are clearly expressed in its title; and, fifth, because it has not been shown that the alley or way which the driver of the truck was attempting to enter is a public thoroughfare. The objections were overruled, and the ordinance admitted.

As the points made against the validity of the ordinance are most vital, we give them first attention. Code, section 681, relating to the enactment of ordinances by municipal corporations, provides that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title," and it is against this rule which it is claimed that this ordinance offends because it attempts, not only the regulation of vehicles in use or left standing upon the streets, but also provides how drivers of teams or other vehicles shall be required to drive; how they shall turn into an intersecting street or avenue; how they shall cross from one side of the street to the other side, and how and where vehicles left standing in the street shall be placed; and that another section of the same enactment deals with obstructions in the streets. Little if any more than the reading of this enumeration of

the several regulations said to be embodied in the ordinance is necessary to demonstrate their unity of purpose, and the propriety of gathering them into a single ordinance. *Healy v. Johnson*, 127 Iowa, 221; *State v. Wells*, 46 Iowa, 663; *Dempsey v. Burlington*, 66 Iowa, 689; *Beresheim v. Arnd*, 117 Iowa, 89. They all have direct reference to the use of the public streets of a city where, by reason of the amount of traffic and the great number of vehicles moving in all directions, regulation and order are demanded to avoid congestion and confusion and facilitate the transaction of business. It would be a very unfortunate situation for the government of cities if we were obliged to hold with counsel that the several matters of street regulation to which reference is made in argument are so unrelated and foreign to each other that they can be treated and regulated only by the enactment of separate ordinances.

But it is urged that even if the ordinance is not vulnerable to the objection that it embodies two or more distinct subjects of legislation, it still offends against the requirement that its subject shall be clearly expressed in the title. The particular point there made is that the words, "An ordinance governing and regulating traffic on the streets," do not have any clear or direct reference to the control or regulation of moving vehicles. It is said that "traffic" has relation alone to buying and selling, and the use of the streets as market places and other matters of kindred nature, and that to extend the phrase to include the use of streets as public ways for the driving of vehicles and the transportation of freight and passengers is not justified by the "approved usage of the language." Code, section 48, subd. 2. That "traffic" in its general sense does include buying and selling and exchange of goods, wares, and merchandise is not to be denied, but, like other words, its precise meaning in any given instance depends largely upon the connection in which it is employed. To the mind of one versed in the use of the English language a reference to "street traffic" or "traffic upon the streets"

of a city does not, in our judgment, suggest simply the business of buying and selling and exchanging of commodities, but also the general movements and intercommunication of the people carried on upon our streets, including travel, the driving of vehicles, the hauling of movables, the transportation of passengers, and all the multifarious activities which may properly avail themselves of the use of a public highway. Such employment of the word appears to be entirely legitimate, and so clearly so that we think that a mere reading of the title of this ordinance must instantly and inevitably direct the thought of the reader to the very matters which it attempts to regulate. Such definition finds support in our standard lexicons. For example, the most recent edition of Funk & Wagnall's Dictionary includes, within the accepted meanings of "traffic," the "business of transportation." So also the Century Dictionary defines it, not only as an interchange of goods, but also as "the coming and going of persons or the transportation of goods along a line of travel." In the case before us the plaintiff with others was being driven along the street in a moving vehicle, and the defendant by its employee was transporting goods along the same street in another vehicle, each movement being an item among those things which make up what we speak of and what the ordinance includes in the comprehensive term "traffic on the streets." We think the question is not open to reasonable doubt, and that the objection to the ordinance because of insufficiency of title must be overruled.

IV. The extent of the record to be considered requires us to abbreviate our reference to other alleged errors in rulings upon the introduction of testimony. One Baldwin, who was shown to be an experienced driver, was asked by plaintiff's counsel for his opinion of the time or distance in which such a truck load could be stopped when being hauled along a substantially level paved street, and the defendant excepts to the admission of his answer over the usual general objections. Contrary to the con-

5. EVIDENCE: expert opinion.

tention in argument, we think there was sufficient evidence of the experience and competency of the witness, and the question was directed to a matter upon which such a witness may give opinion evidence. It may be true that some members of the jury were men whose own experience and observation were equal or superior to that of the witness, but of twelve jurors drawn at large from different ranks and occupations in life it is safe to say that some, if not all, would find the opinion of experts to be of value in properly weighing and applying the testimony.

But it is further objected that the question in this case embodied the thought of a level street, when it appears that the truck was going down a sharp incline. As we read the testimony the street had no marked grade or incline longitudinally. Measuring at right angles from the middle line of the street in the direction of the alley, there was a slight descent, amounting at a point halfway to the curb to only six one-hundredths of a foot, but from this point the slope was accentuated, reaching sixty-three one-hundredths of a foot at the gutter. It thus appears the only incline of any serious moment was within the last twelve and one-half feet of the curb. The driver says that his truck measured eight feet between the rear and front axles, and that the tongue extended thirteen feet beyond the front axle. The length of the outfit from the end of the tongue to the rear of the bed was twenty-four feet, five inches. There was evidence tending to show that the truck was driven along the street railway track astride the left-hand rail until the driver turned to swing into the alley. Now as the automobile must have occupied at least four to six feet next to the curb, and as it was the projecting end of the tongue which did the damage, it follows of necessity that at the time of the collision the rear end of the truck had not yet left the car track, and its movement could not have been materially affected by the slope or incline toward the gutter. Hence we think the question put to the witness was not objectionable as being based upon a

false hypothesis. This is equally true if we accept the defendant's claim that the driver came down the street on the right-hand side of the car track.

It appears that following this accident there was some sort of hearing in the police court at which Loomer, the driver of the automobile, was examined as a witness. One

6. EVIDENCE: examination of witnesses. Mueller, who was present at that hearing, was examined as a witness for the defendant

in this case, and, among other things, he was asked if Loomer, on being questioned why he did not stop his automobile, answered that he did not have to stop; that he had a right to be on that side of the street. The answer was ruled out on the plaintiff's objection. In this there was no error. In the first place, in the absence of any offer to impeach Loomer, it was not competent for counsel to put the answer sought in witness' mouth. Furthermore it would at most have bearing only on the question whether Loomer's negligence did not contribute to the accident, and for reasons hereinafter stated we think his negligence cannot be imputed to the plaintiff.

One Heinz, an employee of defendant, testifying in its behalf, said he saw both the truck and auto approaching the opening of the alley, and described their movements as they

7. EVIDENCE: scope of cross-examination. appeared to him, and, among other things, said he anticipated the automobile was likely to collide with the wagon because of the direction in which they were moving. He was then asked by plaintiff's counsel whether he anticipated that the driver of the wagon would turn his team sharply across the traveled way without looking to see whether any one was coming. This was answered in the negative. In this we think there was no departure from the proper scope of cross-examination. The impressions and anticipations of the witness were, however, matters of no material moment, and might well have been omitted. It is not conceivable that any substantial prejudice to defendant could have resulted therefrom.

V. Prejudicial misconduct of counsel is charged because of the following incident: Counsel for plaintiff was objecting to the course of examination of a witness for defendant on the ground that the inquiry was leading, and at one point emphasized the objection by saying to the court: "Why can't he ask him what he did? There is only one reason, and that is he wants to tell the witness as near as he can." The remark was more petulant than polite, but in the stress and strain of a warmly contested jury trial the quality of professional temper is often severely tried. Experience and observation teach us, however, that wounds thus inflicted are not often so deep or so serious that they may not be more effectually healed by a visit to the nearest cigar counter than by any dressing which the court can apply. This case presents no exception to that rule. Jurors must be given the credit of ordinary common sense and honest purpose to dispose of questions submitted to them upon the evidence under the instructions given by the court, and may be presumed to disregard the ordinary interchange of left-handed compliments between opposing counsel except as matters of momentary diversion.

VI. A motion to direct a verdict for the defendant on the ground that no culpable negligence on its part is disclosed by the testimony was overruled, and this is said to be error. The objection is not borne out by the record. The point is made that the alley, not being a public way, the manner of entering it with team and truck does not come within the terms of the ordinance. But we cannot so hold. Here was a sixteen-foot alley opening out upon the public street into and out of which the teams and trucks of defendant and of others were being driven. It was open to the public to the extent that, as was said in behalf of the defendant on the trial, any one who desired to do so could drive or pass through its course so long as the property of the proprietors was not interfered with. But even if devoted wholly to private use, it was an

8. NEW TRIAL:
misconduct of
counsel.

9. MUNICIPAL COR-
PORATIONS: OR-
dinances: con-
struction of
term "alley."

alley connected with the street, and therefore within the express language of the ordinance. The reason which called for such regulation governing the entrance to one alley applies with equal urgency to all, without regard to whether it be public or private. The purpose of requiring the driver to keep to the right side and make his turn into the alley as near as practicable to the right curb was evidently to prevent this very class of accidents by avoiding, so far as possible, the "pocketing" between the turning vehicle and the curb of other vehicles following their proper course along that side of the street. Whatever may be the truth as to the course taken by the driver of the truck, whether in the middle or to the left of the middle of the street, as claimed by plaintiff, or to the right of the middle as claimed by defendant, we think it was fairly open to the jury to find that, had he exercised reasonable watchfulness to look to his right or to control the movement of his team and truck, the collision would have been avoided. He knew, or was bound to know, that other vehicles moving along that side of the street were liable to be approaching along the curb, and that his entrance into the alley opening would interrupt such travel. Whatever may have been his exact course it is perfectly clear that he was not driving near the right-hand curb, and drivers of other vehicles moving from the rear in the same direction, and keeping to the curb, were not bound to anticipate that he would swing across their line of travel without exercising due care to avoid running into them. Indeed it seems hardly possible that the collision could have happened at the place and in the manner described by both parties had he used any fair degree of care to guard against the dangers incident to such use of the highway. If he was negligent, then his negligence was that of his employer; and, to say the very least, there was no such failure of evidence on the part of plaintiff as to call for a directed verdict against her.

It is next said that plaintiff herself was negligent. Her testimony tends to show that, as she saw the near approach

of the truck and realized the danger of collision, she put out

10. **NEGLIGENCE:**
automobile ac- her hand, motioning the driver of the truck
cident: con- to hold up, when the forward thrust of the
tributory truck struck the palm of her hand, whether
negligence.

by sheer accident or because of an instinctive movement on her part to ward off the threatened stroke is not entirely clear, and her injury followed as already described. Because of her action in this respect we are asked to hold that as a matter of law she was guilty of contributory negligence. The statement of the circumstances demonstrates the unsoundness of the objection. Plaintiff was confronted with a sudden peril. Her effort to attract the driver's attention and avert the collision was a proper one. The thrusting out of her hand was at least a natural movement, even if a futile one, and to lay down the rule that an act so humanly natural in a sudden and alarming emergency is negligence as a matter of law would be to overturn the most fundamental principles of the law governing recoveries for personal injury.

In this connection we may as well consider the further objection here made, and also again raised upon the charge to the jury, that Loomer, the driver of the automobile, was

11. **SAME:** im- negligent in the management of the car, and
puted negl- that such negligence is in some way imputable
gence.

to the plaintiff. Of the fact that plaintiff was the guest of Loomer in the car, that she was in no manner responsible for its control or movement as owner, proprietor, or hirer—there is not the slightest dispute. That the negligence of the person giving the invitation is not to be imputed to an invited guest under such circumstances is the settled law of this state. *Nesbit v. Garner*, 75 Iowa, 314; *Larkin v. Ry. Co.*, 85 Iowa, 504; *Bailey v. Centerville*, 115 Iowa, 271. Counsel do not deny the authority of these precedents, but say the court should have submitted to the jury the question whether plaintiff and the driver were not engaged in a common enterprise, and, if so, the conduct and negligence, if any,

of Loomer would be imputable to plaintiff. We can readily conceive that plaintiff and Loomer might have been driving together under circumstances which would justify the conclusion that they were engaged in a common enterprise, but certainly such common purpose or interest is not to be inferred from the fact that they were riding in the same vehicle, one of them driving and managing the same, while the other occupied another seat, passively going wherever the driver saw fit to direct their course. Nor can it be inferred from the fact that the latter accepted the invitation of the former to ride as a matter of simple pleasure or outing. Indeed the fact that one invites and the other accepts a simple invitation of this kind, without suggestion of some common end to be accomplished by their united effort or agency, tends to negative any such relation.

In none of our cases are the conditions ordinarily necessary to justify an imputation of a driver's negligence to his passenger or companion more succinctly or concretely stated than in *Larkin v. Ry. Co.*, 85 Iowa, 504. In that case the plaintiff engaged at a livery stable a team and driver to take her to the home of a friend in the country. In attempting to cross a railway track which intersected their route of travel, they were struck by a passing train, and plaintiff received an injury. In an action against the railway company to recover damages the defendant sought to impute to plaintiff the alleged negligence of the driver. Upon this contention the court charged the jury that the driver's negligence would prevent a recovery only in case it was found that he was under the control and direction of plaintiff, or in case she had the right to control or direct him, and the rule of law thus stated was approved by this court. Of the facts in the case the court said that plaintiff had no knowledge of the proper route to her place of destination; that such matter "was left to the determination of the liveryman and his driver. She gave the driver no directions as to the course to take, and assumed no control over him." As there was a dispute in that

case upon some of these propositions it was properly submitted to the jury. But in the case before us there is no conflict, and the jury would not have been justified in imputing Loomer's negligence, if there was any, to the plaintiff.

It is said that the ride being taken could be considered a common or joint enterprise within the law because the trip was being taken as the result of an arrangement or agreement between Loomer and plaintiff and another friend the evening before the accident, and all were riding together for the common pleasure to be so found. The extent of this arrangement seems to have been that plaintiff, a nonresident of the city, was visiting a friend in Waterloo, and on Sunday evening Loomer and his wife called upon them. Before leaving Loomer said in substance that if they would like he would be pleased to take them out and let them see how the town had grown since their previous visit. The invitation was accepted, and it was arranged that he would call for them on the following morning, as he in fact did. This in our judgment has no tendency to show a joint undertaking or enterprise in which either party assumes, or is charged with, any responsibility or liability for the negligence of the other. It is no answer to say that both driver and his guest were out for the pleasure or recreation to be derived from the ride. If A. accepts the invitation of B. to walk with him to church, or to the postoffice, or as a matter of mere recreation, and while so engaged A. is injured by the negligence of C. to which B.'s want of care in some manner contributes, counsel would not think of insisting that B.'s negligence should be imputed to A., and thereby release C. from liability for his tort. If not, then in what manner is their relation changed if, instead of inviting him to walk, A. politely invites B. to get into his carriage and ride to church, or to the postoffice, or for an hour's diversion?

It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for

present purposes to say that to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation.

There was no evidence upon which the jury could have properly found plaintiff chargeable with the negligence of Loomer, and there was no error in refusing to direct a verdict for defendant on that ground, or in refusing to submit the question to the jury.

VII. Various other exceptions preserved by defendant relate to the charge to the jury and the refusal of requested instructions. Most of these points are covered by the discussion already had, and we shall not further consider them. Some of the other questions thus raised are sufficiently covered by the charge given by the court.

12. INSTRUCTIONS :
refusal of
requests.

Still others of the requests for instructions state mere abstract legal propositions without any suggestion or direction to the jury for their proper application to the case in hand, and there was no error in refusing them.

Several of these requests bore upon the proposition that if the proximate cause of the collision was the negligence of Loomer, then the injury to plaintiff could not be charged to defendant and she could not recover. One request sufficiently covering that point was in fact given to the jury, and the court rightly declined to incumber its charge by a repetition of the same thought in different forms.

13. SAME.

Concerning the error assigned upon the court's refusal to charge the jury that no consideration should be given the plaintiff's profession as a music teacher, we have already sufficiently indicated our views. It ought to be said perhaps that, while refusing the instruction asked, the court in charging the jury seems in effect to have excluded that feature

of the case as an element to be considered in the estimate of damages. Upon the measure of damages the court said that if the jury found for plaintiff, "the measure of her recovery is such sum as will fairly compensate her for injuries directly resulting in consequence of defendant's negligence, which would include inconvenience, disfigurement, and pain of body and anguish of mind which she has suffered in consequence of the injury, and such, if any, as it is reasonably certain she will, in consequence of such injuries, be subject to in the future," also for expenses incurred for physicians and nurses and for medical and hospital expenses made necessary by such injury. We think the jury must have understood that in finding plaintiff's damages they were confined to a consideration of the elements thus enumerated, and if there was any error in failing to mention the matter of plaintiff's profession or her loss of time, the prejudice, if any, was to the plaintiff rather than to the defendant.

A painstaking examination of the record reveals no prejudicial error, and the judgment below is—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

CHARLES R. HUNTER, Appellee, v. AUGUST AMISH ET AL.,
Appellants.

Estates of decedents: CONVEYANCE OF REAL PROPERTY BY EXECUTORS.

- 1 Where the testator's will authorized the executors when dully qualified to convey real property, and after probate of the will and qualification they made a deed to the property and received the consideration therefor, the title thus conveyed was not affected by an unauthorized, void or voidable contract to convey the property to the same grantee, made before their appointment; especially where there was no objection made by one having a right to complain and no suggestion of fraud or that the land was not sold at its fair value.

Real property: QUIETING TITLE: PLEADING: PROOF: VARIANCE. In 2 actions to quiet title the plaintiff need only allege that defendant claims some adverse interest; so that a petition alleging that defendant claimed under a judgment against one of the heirs to an estate, while the evidence showed that the claim was through another heir, did not constitute a failure of proof.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

SATURDAY, MARCH 14, 1914.

ACTION in equity to quiet title to land. Decree for plaintiff, and defendants appeal.—*Affirmed.*

F. B. Kimball, for appellants.

W. J. Baldwin and *S. K. Stevenson*, for appellee.

WEAVER, J.—The petition alleges that the plaintiff is the owner in fee of a certain described tract of land, having acquired the title thereto by purchase and proper deed of conveyance from the executors of the last will and testament of one Rosa Weber, who died seised thereof. It is further alleged that defendants make some claim to or lien upon the said lands, based upon a judgment rendered against one of the sons and heirs of the said Rosa Weber, but plaintiff avers that said judgment was not and is not a lien on said land or on any interest therein. He further says that, before beginning this proceeding he tendered to the defendants the sum of \$1.25 and demanded from them the execution and delivery to him of a quitclaim deed of said land, but defendants refused to accept the tender or to execute or deliver the deed. A decree quieting the title in plaintiff and for the recovery of costs and attorney fees is prayed.

Answering the petition, defendants admit that Rosa Weber died seised of the property, and that she left a will, which was duly probated, but deny that the land was ever

conveyed to plaintiff by a valid deed. They also deny all allegations of the petition, except as above admitted. Defendants also file a counterclaim, alleging that August Amish, the husband of his co-defendant, is the owner in fee of a one-eighth part of said land, and pray that such title may be quieted in him.

There was a trial to the court upon the issues thus joined, and decree entered dismissing the defendants' counterclaim, and quieting the title to the entire tract in plaintiff. The will of Rosa Weber was considered by this court in the case of *Hunter v. Savings & Trust Co.*, 157 Iowa, 168, and the conclusions there announced appear to control the disposition of this appeal. It is claimed, however, that the record in this case shows certain facts not appearing in the former case, and should lead to a different result. The will in question, as originally made, provided for the payment of a few small legacies and the division of the residue of the estate among her eight surviving children in equal shares. Thereafter she executed a codicil to said instrument as follows:

I nominate and appoint my son, William Weber and A. B. Frisbie, my son-in-law, to be the sole executors of this will and my estate without bond and authorize and empower them to sell my real estate and sign a deed therefor, as fully and completely as I myself could do. And said deed when so signed shall convey all right, title and interest I have in any of my real estate at the time of my death. And no bonds shall be required for the sale of said real estate, property or other purpose.

The testatrix died December 26, 1909. The will and codicil were duly probated on April 16, 1910, and on the same day the executors qualified under said appointment. It appears, however, that on April 8, 1910, and before the probate of the will and qualification of the executors, they assumed authority to enter into an executory contract for a sale of the land in question to plaintiff, the conveyance to be made March 1, 1911, by executor's deed having the approval

of the court. On March 11, 1911, the executors conveyed the land to plaintiff substantially as was provided for by said contract, and received from him full payment of the agreed price. It further appears, though perhaps not strictly relevant to the questions presented, that Mrs. Weber left no personal assets, and that there were unsecured claims against her estate to the amount of about \$400, and further indebtedness of \$2,500 secured by mortgage on the land.

The principal contention of appellants in argument is that plaintiff failed to show title in himself, because the original contract between him and the executors was made

before the probate of the will, and before the executors had any authority to act. It may be conceded that the preliminary contract

was made without authority, and conferred no right on plaintiff which the court would enforce against the land or estate of the testatrix, but this concession does not necessarily avoid the conveyance thereafter made, or afford ground on which a defense may be planted against the right of plaintiff to a confirmation and establishment of his title. The will did confer upon the executors, when duly qualified, authority to convey the land, and to convey a title unincumbered and unclouded by the liens of judgments rendered against the heirs of the testatrix. This was determined by our decision in the prior appeal. The conveyance having been made, and consideration received by the executors in their trust capacity at a time when they were admittedly qualified and empowered so to do, it is not a material matter that, before their appointment, they made an unauthorized or void or voidable agreement to sell and convey to the same grantee. This is particularly true where no party or person having a right to complain appears to object, where no fraud is charged, and there is neither allegation nor suggestion that the land was not sold for its full and fair value. The defendant is a stranger to the transaction. His judgment, if he has one against an heir of the testatrix, and a sheriff's deed, if he

1. ESTATES OF DE-
CEDENTS: con-
veyance of real
property by ex-
ecutors.

has one based on said judgment, are alike unavailing to avoid the effect of a sale of the land by the executors, or to give him title to or lien upon such land in the hands of the purchaser. The law as applicable to this state of facts was sufficiently discussed in the case to which reference has already been made.

Counsel for appellants further insists that, because plaintiff's petition speaks of judgments against the heir, Frank Weber, and the testimony only revealed judgments against

2. REAL PROPERTY : another heir, George Weber, there was a failure of evidence on which to base a decree quieting title : pleading : proof : variance.

quieting plaintiff's title. The mention of the name of a judgment debtor in the petition was wholly unnecessary. It is sufficient in this class of cases for the plaintiff to allege that the defendant claims some adverse interest to or title in the land. Code, section 4224; *Paton v. Lancaster*, 38 Iowa, 494.

Moreover, the defendants by their counterclaim or cross-petition asserting title in themselves to a part of the land supplied all the proof needed that they were, in fact, making some claim inconsistent with plaintiff's claim of title, thus opening the door to the court for a full and exhaustive inquiry into the claims of ownership by the respective parties and the facts relied upon in their support.

The record discloses no defect in the title of plaintiff, and is barren of any showing of title in the defendant. The decree below is right, and it is—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concur.

E. J. WILSON, FRED H. MUNSON, ALICE MORSE and HENRY J. MUNSON, Appellants, v. FIRST NATIONAL BANK OF INDEPENDENCE, IOWA, and THE MUNSON INDUSTRIAL TRAINING SCHOOL, Intervenor, Appellee.

Charitable gifts: VALIDITY. Gifts to charitable purposes will be upheld
1 when consistent with law; and to this end the rules of law will be
liberally applied, thus often sustaining a charitable bequest where
a private trust would fail.

Same: INDEFINITENESS. A charitable gift is not void for indefinite-
2 ness, where those benefited are designated in a general way, but
leaving the application of the gift to be made by the trustee.

Same: ESTABLISHMENT OF SCHOOLS. Gifts for the establishment of
3 schools for the mental or moral improvement of the people, espe-
cially for the poor, are lawful public charities.

Same: DEFINITENESS. A gift for the establishment of an industrial
4 training school for children and a library building to be used by the
people of a certain town, naming trustees to administer the gift until
a corporation was organized for that purpose, and providing for the
construction of a school building and that the school should be
open to all persons fitted for the training offered, regardless of sex,
race or color, was not invalid on the ground of indefiniteness; as
it is sufficient if the general nature and purpose of the gift is
expressed, or reasonably ascertainable from the instrument, leaving
the practical working out of the object sought to the trustees.

Same: PERPETUITIES: APPLICATION OF STATUTE: CHARITIES. Gifts
5 to charitable uses are not prohibited by the statute against per-
petuities; and a gift for the establishment of a training school
for children and for a public library is for a charitable purpose
and is not in violation of the statute, although not limited to the
use of the poor and needy; as the term charity includes any scheme
for the betterment of society, and includes any gift consistent
with law tending to promote science, education or enlightenment or
the public convenience.

Same: PERPETUITIES: STATUTE. A bequest of bank stock for a chari-
6 table purpose, subject to the payment of dividends thereon to
relatives of the testator during their natural lives, and upon their
death the stock to be turned over to the charity, was not invalid
as against the statute of perpetuities on the ground that it was a
gift over after the lapse of another gift.

Same: PERPETUITIES: STATUTE. Where a testator bound the trustees
7 of a charitable bequest by contract to organize a corporation within
a year after his death to take over the bequest, and he reaffirmed the
same in his will, the gift was not in violation of the statute against
perpetuities in that it failed to limit the time for organization of
the corporation.

Same. Where the testator secured the erection of a building for school
8 purposes during his lifetime, and by his will created a fund for its
support, which was not available until after the death of relatives
to whom he gave the income for life, those appointed to manage
the trust were not chargeable with negligence or laches, because
failing to anticipate the receipt of the fund and to attempt to con-
duct the school without means.

Charitable trusts. Where the charitable character of a trust has been
9 made apparent all doubts will be resolved in its favor.

Same: VALIDITY. A charitable trust will not be held invalid simply
10 because it cannot take effect as fully as the donor intended; but
it will be given effect by the court as far as possible. Nor will it
be held void because contemplating gifts from others which may
never be made; and in the absence of any evidence as to the neces-
sities of the case a gift of \$30,000 for the purpose of founding a
training school and public library will not be held so inadequate
as to invalidate the bequest for that purpose.

Same: NECESSITY THEREFOR. A bequest for the establishment of a
11 training school will not be held invalid on the ground that the
necessity for such charity has been removed by provision therefor
in the public schools. It is not open either to the parties or the
court to enter upon such an inquiry.

*Appeal from Buchanan District Court.—HON. FRANKLIN C.
PLATT, Judge.*

SATURDAY, MARCH 14, 1914.

THE opinion sufficiently states the case.—*Affirmed.*

*W. H. Norris and E. B. Stiles, and M. A. Smith, for
appellants.*

*Lake & Harmon, for intervener First Nat. Bank of In-
dependence.*

Hasner & Hasner, for appellee.

WEAVER, J.—Perry Munson, a resident of Independence, Iowa, died testate December 30, 1893, and his will was duly admitted to probate. He left surviving him neither widow nor lineal descendant. He was a man of considerable wealth, and among the items of his estate were one hundred shares of the stock of the First National Bank of Independence. The validity of the disposition made by him of these shares of stock is the question we are called upon to decide. The provisions of the will in this respect read as follows:

(7) My stock in the First National Bank of Independence, Buchanan county, state of Iowa, is to be kept in my name and the dividends declared on the same are to be paid to my brother John J. Munson, and to my sister Sarah R. Munson at the making and payment of said dividends during the lifetime of each of said persons. On the death of both John J. Munson and Sarah R. Munson the said stock is to be turned over to the board of directors of the library and industrial training school hereinafter provided for. . . .

(9) I desire to establish at Independence, Iowa, an industrial training school for children and a library building to be used by the people of Independence, Iowa; but not having the means that I can devote to that use to at once put the same in full operation I have put into the hands of three trustees, who are hereinafter named, the sum of fifteen thousand dollars for the purpose of erecting a building suitable for use as a library and as an industrial training school building which is to be used by the free public library of Independence, Iowa, for all time free of rent or charges; except the city of Independence may be required to furnish the free use of water from the city waterworks, and the other parts to be used for an industrial training school, and in the construction of said building I desire that it shall be well and substantially built and shall also be constructed with such finish as to be an ornamental building to the city.

(10) I hereby name, constitute and appoint Wallace Francis, Michael Tims, and Jed Lake the trustees to take and use the fifteen thousand dollars in the construction of the building to be used for the free public library of Independence, and for the industrial training school and I have made a contract with them for doing the said construction and have

placed in their hands the said sum of fifteen thousand dollars so that they may erect the building and put the same to use during my life, but for reasons given to them by me it is agreed that the building is to be run in their name during my life, but after my death is to be incorporated under the laws of Iowa, and in making such incorporation I direct that the building and all funds I give to the same be so cared for that all persons who desire to be educated in such industrial training school shall have all its privileges without regard to sex, race, color or other conditions than that they are fitted for the training and shall comply with such reasonable rules and regulations as may be made for the control of said training school. I also direct that such incorporation shall be so made that others may make bequests for the extension of the school and that such bequests may be used as the donors may designate. It being my wish and desire to have this school founded on the most liberal principles as to its use for the benefit of the persons to be educated therein and to make of them useful men and women.

(11) On the death of my brother John J. Munson and my sister Sarah R. Munson the stock in the First National Bank of Independence, Iowa, shall be transferred to the board of directors of this industrial training school and used by them in carrying out the objects of the school and in case the stock in the People's National Bank of Independence, Iowa, passes to the board of directors of the library and training school as provided in the 2d and 3d items of this will the same shall be turned over to the board of directors provided for this industrial training school to be used by them for the promotion of the objects of said training school.

(12) I also further direct that if after getting a plan of building and an estimate of the cost of the same with the furniture, fixtures and heating the same it shall be found that such a building as is desired for the library and industrial training school cannot be built for the money herewith appropriated the said trustees named, shall put this sum of fifteen thousand dollars at interest taking good security for the same until the amount and interest will be sufficient to construct the building. When said sum is sufficient to construct the building as desired, then the said trustees shall proceed to construct the building as directed. And in case any other party will furnish the amount in addition to this fifteen

thousand dollars that is necessary to construct, complete and furnish said building then so soon as that amount is provided the said trustees shall at once proceed to construct the said building and complete the same as soon as practicable.

(13) I make, constitute and appoint my brother John J. Munson the executor of this will and I especially charge him with the carrying out of the bequest as to the building for a library and industrial training school so far as is necessary to have the articles of incorporation make the use of the same liberal to all and to provide for its extension by others if they so desire and in case the building is not erected before the said John J. Munson is appointed executor under this will I hope he will interest himself to see that the building is well and substantially built and that it is ornamental to the town and is well finished and furnished. As the contract I have made with the trustees, Wallace Francis, Michael Tims and Jed Lake, is to be deposited with this will so as to become a part of my requests as to what is to be done, I desire that my executor see that the terms of the same are carried out in good faith as far as he can do so by his council and advice.

The will was executed July 24, 1893. On the same day the testator entered into a written contract with Wallace Francis, Michael Tims, and Jed Lake, citizens of Independence, reciting the purpose of the testator to place in the hands of the persons named \$15,000 for the erection of a building suitable for a free public library and training school at Independence, and directing them within one year after his death to organize a corporation to hold, manage, and control such property and the funds which might thereafter be donated for the promotion of its charitable purposes. On October 11, 1894, and within one year after the testator's death, such corporation was in fact organized under the name and style of the Munson Industrial Training School. Before the death of the testator, the said trustees received from him the sum of \$15,000, and thereafter did erect the building as proposed, though at the testator's request his connection therewith was withheld from the public during his lifetime.

This action was begun in equity April 25, 1912. The

plaintiffs in their petition recite the facts of the death of John J. Munson and Sarah R. Munson, to whom the dividends upon said bank stock had been given for life under the provisions of the seventh paragraph of said will, and allege that plaintiffs are the only heirs at law of the testator, and as such are entitled to demand and receive said stock to their own use. Upon this showing they ask a decree confirming their claim, and that the bank be ordered to deliver into their hands the certificates of said shares. The bank pleads the facts relating to the will, lays no claim to the shares, and avers its readiness to deliver the certificates to the party or parties whom the court shall find entitled thereto. The Munson Industrial Training School intervenes, denies plaintiffs' claim to the stock, and avers ownership thereof in itself. It pleads the will of Perry Munson, deceased, and the trust agreement above mentioned as its sources of title. They further plead the performance of said trust agreement, the incorporation of the trust according to its terms, the erection of the building, the use thereof as the home of the free public library of the city, and the readiness of said corporation and its trustees to organize and maintain an industrial school such as prescribed by the terms of the will. By way of reply plaintiffs deny the claims of the intervener and say further that during the eighteen years since the death of Perry Munson no effort has been made to conduct or maintain a training school in said building; that no other gifts or bequests have been made in promotion of said charity; that no efforts have been made to increase said fund; that the amount of said bequest is wholly inadequate to maintain such a school as the will seems to contemplate; that the building is also inadequate and unfitted for said purpose; and that the officers and directors of the corporation, though knowing all the facts relating to the estate, have asserted no claim to the stock during the time elapsed since the testator's death, and by reason of their failure to establish or maintain the proposed school have forfeited all right thereto. It is

further alleged that the school district of Independence has inaugurated and maintains a fully and adequately equipped manual and industrial training school, and the conditions which operated upon the mind of the testator inducing his attempt to found such a school no longer exist. There is also a plea in the nature of a claim of adjudication based upon the approval of the final report of the executor of the will.

The parties stipulated the facts upon which the case was submitted to the trial court. The terms of the will, the trust agreement, the corporate organization, the erection of the building at a cost of \$15,000, the use of the building by the free public library of Independence, the death of John J. Munson and Sarah R. Munson, and the status of plaintiffs as the only heirs of Perry Munson are all conceded. The description and dimensions of the building are stated, and the fact that at present the rooms are under lease to the ladies' societies of Independence is admitted. It is also admitted that no industrial school has been maintained except during the winter seasons, when volunteer teachers have on stated days conducted sewing schools there for poor children. Nor is there any dispute that the public schools of the city now teach domestic science and manual training.

Upon the record thus made the trial court found and decreed that the provisions of the will devoting said bank stock to the maintenance of an industrial school, as provided for in said bequest and trust agreement, constitute a valid gift; that the corporation organized and known as the Munson Industrial Training School is the rightful beneficiary of said gift and the lawful owner of said stock for the uses and purposes designated by the donor. From this decision the plaintiffs have appealed.

The issues have been stated at more than ordinary length in the belief that a full and clear understanding of the admitted facts will so demonstrate the correct conclusion of the questions of legal right that an extended discussion of

principles, rules, and precedents will be unnecessary. Taking up the points argued by counsel in the order of their statement, they are as follows:

I. The gift is void because of its vague and indefinite character. The rule here involved is one upon which the courts have frequently been called to pass, and the general principles applicable to such cases have all been so thoroughly and frequently considered that we need here do little, if anything, more than to call attention to what we deem to be the settled conclusions.

It will be conceded that here and there will be found a decided case which tends to restrict the scope of valid gifts to charitable uses within narrow limits, but the doctrine that such gifts appeal to the favor of courts and will be given effect if consistent with law, and that to such ends the most liberal rules within the allowable limits of chancery jurisdiction will be resorted to, if necessary for their support, is so generally upheld and applied as to remove the question from the field of debate. See Marshall, J., in *Harrington v. Pier*, 105 Wis. 485 (82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924). So pronounced is this rule that a charitable trust will often be sustained under circumstances where a private trust would fail. *Ingraham v. Ingraham*, 169 Ill. 432 (48 N. E. 561, 49 N. E. 320); *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Sanderson v. White*, 18 Pick. (Mass.) 333 (29 Am. Dec. 591); *Johnston's Estate*, 141 Iowa, 109; *Duggan v. Slocum* (C. C.) 83 Fed. 244; *Williams v. Pearson*, 38 Ala. 299.

Indefiniteness as to the individual beneficiary is no objection to the validity of a charitable trust. On the contrary, such indefiniteness is rather a characteristic feature of a good devise to charitable uses. It is sufficient if the class to be benefited is designated in a general way and the practical application of the gift to its intended uses is confided to a trustee. *Heuser v. Harris*, 42 Ill. 425; *Andrews v. Andrews*, 110 Ill. 223; *Kronshage v.*

1. CHARITABLE
GIFTS: validity.

2. SAME: indef-
niteness.

Varrrell, 120 Wis. 161 (97 N. W. 928); *Harrington v. Pier*, 105 Wis. 487 (82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924); *Estate of Johnston*, 141 Iowa, 111; *Grant v. Saunders*, 121 Iowa, 80; *Phillips v. Harrow*, 93 Iowa, 103; *Chapman v. Newell*, 146 Iowa, 422; *Tappan's Appeal*, 52 Conn. 412.

That gifts to establish or endow schools for the mental or moral improvement of the people, and especially of those members of society who are handicapped by actual or com-

parative poverty, are lawful public charities
 3. **SAME: estab-** is so well settled as to require no elaboration
 lishment of of argument or citation of authority. A very
 schools. large proportion of the gifts by charitable and public-spirited testators is of this class, and they are uniformly sustained, when coupled with no condition or restriction inconsistent with established principles or rules of law.

The intent and purpose of the testator in this case are so clearly stated and expressed by him as to be open to no reasonable doubt. He says: "I desire to establish at Independ-
 4. **SAME: definite-** ence, Iowa, an industrial training school for
 ness. children and a library building to be used by the people of Independence, Iowa." Language more adequately describing the nature of the charity or the beneficiaries thereof could hardly be chosen. He then proceeds to name the trustees who should administer his bounty until a corporation could be organized to take over and exercise the powers and duties necessary to the proper execution of the trust. Such a gift reveals no fatal lack of definiteness. Even if desirable, it would be practically impossible for the donor of such a charity to prescribe the details of its organization, work, and operation, and he adopted the usual and only practicable plan of empowering the trustees of his gift to make all reasonable rules and regulations for its management within the general scope of his expressed purpose.

In addition to the cases already cited, the books are filled with precedents to the effect that, where the general nature

and purpose of the charity is expressed or is reasonably ascertainable, the matter of its practical administration may be committed to trustees. To quote from *Harrington v. Pier*, *supra*:

It is sufficient if there be a trust and a particular charitable purpose, as distinguished from a gift to charity generally. The court may supply the trustee to administer the trust; the trustee may select the beneficiaries from within the general class named by the donor, and when necessary may work out the details of the declared purpose within its stated general limits. Certainty of beneficiaries who can invoke judicial power to enforce the trust is not only unnecessary, but is inconsistent with the very nature of a trust for charitable uses, in that the beneficiaries, in a general sense, are the members of the public at large. A public charity, within the rule mentioned, is sufficiently definite as to purpose if its general purpose be clearly stated, or it can be made otherwise certain by the trustees clothed with the power of administering the trust within the limits of the declared purpose.

None of the cases cited upon this point by appellants are controlling upon the question here presented. It is possible that decisions of the courts of New York and a few others which have followed those precedents may not be in entire harmony with the views here expressed, but it is to be said that these precedents have their origin in the influence of the peculiar statutes of that state and constitute exceptions to the rule adhered to by a large majority of the courts in other jurisdictions.

It is unnecessary to prolong citations from the authorities illustrating the various gifts to charity which have been sustained against objections of this kind. Those already mentioned are sufficiently illustrative of the rule to which we adhere. There is in this case no lack of definite statement to leave either the trustees or the court in doubt as to the meaning and intent of the donor. It requires no resort to the *cy pres* doctrine in order to designate the nature of the char-

ity to be promoted or the class to be benefited. We have only to take the testator at his word and give it effect according to its clear meaning. No other conclusion is possible, unless we are to abandon the rule which requires the court to sustain gifts to charity whenever it is reasonably possible and go out of our way to hunt for some plausible ground upon which to defeat them.

II. It is next argued that the will violates the statute against perpetuities. That statute in general terms makes void any disposition of property which suspends the absolute

5. SAME: perpetuities: application of statute: charities. power of controlling the same for a longer period than during the lives of persons then in being and twenty-one years thereafter.

Code, section 2901. Counsel concede, as indeed they must, that gifts to charitable uses do not come within the prohibition of this statute. *Phillips v. Harrow*, 93 Iowa, 92; *Jones v. Habensham*, 107 U. S. 174 (2 Sup. Ct. 336, 27 L. Ed. 401); Gray's Perpetuities, section 600; *White v. Keller*, 68 Fed. 801 (15 C. C. A. 683); *Re Cleven's Estate*, 161 Iowa, 289. But it is sought to except the gift in question from the effect of this rule. Indeed, counsel speak in one place of the trust provided for by the testator as "noncharitable," though we think perhaps it is a chance expression and not a declaration of their view of the law. It is true that the gift is for the double purpose of housing the free public library of Independence and for the benefit of children, without limiting the same to the poor or needy, but such limitation is not necessary.

The word "charity," as used in law, has a broader meaning and includes substantially any scheme or effort to better the condition of society or any considerable part thereof. It has been well said that any gift not inconsistent with existing laws, which is promotive of science or tends to the education, enlightening, benefit, or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience, is a charity. *Historical Society v. Academy*, 94

Mo. 459 (8 S. W. 346); *Jackson v. Phillips*, 14 Allen (Mass.) 539; *Re Lennon*, 152 Cal. 327 (92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024); *Hoeffler v. Clogan*, 171 Ill. 462 (49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241); *Price v. Maxwell*, 28 Pa. 23; *Müller v. Porter*, 53 Pa. 292; *Chapman v. Newell*, 146 Iowa, 415.

It is further suggested that this gift is in the nature of a gift over after the lapse of a prior gift, and is therefore an exception to the rule. The will is not in our judgment open
 6. SAME: perpetuities: statute. to this interpretation. The substance or effect of it is to give or devote the bank stock to the describing charity, subject, however, to the right of John J. Munson and Sarah R. Munson to receive the dividends thereon during life. They were given no title or property right to the shares as such, and they were not to have possession or control thereof. The title of the stock was in the trustees or the corporation from the death of the testator, subject only to the incumbrance or charge by which the dividends were devoted to a brother and sister of the testator for a period which was bound to terminate within the time limit fixed by the statute above cited.

Again it is said that the will, while providing for a corporation to take over the trust, does not limit the time for its organization, and there was no certainty that it would be or-
 7. SAME: perpetuities: statute. ganized within the limit of the statute against perpetuities. If we were to admit that such uncertainty would have the effect claimed for it, the fact that the testator had bound his trustees by contract to organize the corporation within one year after his death, and that such contract is referred to and reaffirmed by him in his will, supplies all the certainty required in this connection. Moreover, it is conceded that the trustees did in fact incorporate within the year, and, had they failed of their duty in this respect, it was within the power of the court to compel an observance of their obligations.

Finally, upon this point, it is said there is no training

school in existence which meets the requirements of the will, and for that reason the fund does not vest in the corporation.

8. **SAME.** In view of the conceded facts, this objection is unreasonable. While the testator secured the erection of the proposed building in his lifetime, the money given prior to his death was wholly invested and intended by him to be wholly invested in its construction. By the terms of the gift in his will, the fund for the support of the school was not practically available until the death of the brother and sister, and neither the trustees nor the corporation are chargeable with any neglect or laches because they did not anticipate such death and attempt the establishment and conduct of a school without means therefor. The statute against perpetuities is intended to regulate private trusts, but —“a public or charitable trust may be perpetual in its duration and may leave the mode of its application to the discretion of the trustees.” *Jackson v. Phillips*, 14 Allen (Mass.) 550; *Sanderson v. White*, 18 Pick. (Mass.) 333 (29 Am. Dec. 591).

The charitable character of the trust being made apparent, all doubts will be resolved in its favor. The case of *Meek*
9. **CHARITABLE TRUSTS.** *v. Briggs*, 87 Iowa, 610, and others of the class cited by appellants deal with private trusts and have no proper application to trusts in aid of charity.

III. It is also the contention of the appellants in argument that the legacy or gift in this case is inadequate in amount to accomplish the intended purposes; that the building provided is too small to accommodate a
10. **SAME: validity.** school of the kind contemplated; that the need of such instruction has been supplied by the school authorities, and there are no “proper beneficiaries” of such charity.

There is no evidence whatever of the amount of money required to put such a school into successful operation, and it would be going far for the court to assume, as a matter of

common knowledge, that the testator's charity is doomed to failure. It was the right of the testator to do as he would with his own, and even if he saw fit to invest \$30,000 or more in the experiment of founding a school, hoping that his gift might stimulate others of like mind and purpose to supplement such fund with their bounty, and knowing that if such aid was withheld such school would very possibly fall into decay or at best achieve very limited success, it is not for the court to thwart his benevolent purpose for the benefit of his collateral relatives, for whom he appears to have otherwise liberally provided.

It is a settled rule that a charitable gift, devise, or bequest will not be avoided simply because it cannot take effect as fully as the donor intended but will be given effect so far as it can. Such was the holding of this court in *Miller v. Chittenden*, 4 Iowa, 269. So, also, it is held by the Massachusetts court that a gift to charitable uses will be sustained wherever it is possible, and that "where a literal execution may become impracticable or inexpedient, in part or even in whole, it will be carried into effect so as to accomplish the general purpose of the donor, as nearly as circumstances will permit, and as such general charitable intent can be ascertained." *Sanderson v. White*, 18 Pick. (Mass.) 333 (29 Am. Dec. 591). A devise to charity is not necessarily void because it contemplates possible contributions from others which may never be realized. *Re Daly's Estate*, 208 Pa. 58 (57 Atl. 180). The cited case is quite in point with the one at bar, and its discussion of the principles governing the courts in relation to such gifts fully bears out the views we have already expressed. It may be that the building erected and the funds provided are insufficient to afford manual training for all persons eligible thereto under the terms of the trust, but that is no reason why the corporation should not be permitted to organize and carry on a school for the benefit of so many as may be accommodated with the means at its disposal. No charity is unlimited in its resources, and all must draw a line

upon admission to their benefits, when their ability to extend such benefits is exhausted.

There is no merit in the proposition that this charity has been superseded by the adoption of manual training in the public schools. There is no such apparent surfeit of educational facilities as enables the court to say
11. SAME: necessity therefor. there is no opportunity for philanthropic and public-spirited men of wealth to devote their means to plans for promoting the intellectual development and manual skill and efficiency of young people by the establishment of institutions devoted to that purpose. Nor do we think it open to the parties or to the court to enter upon any such inquiry. See *In re Johns' Will*, 30 Or. 494 (47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242); also *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375. So far as common observation may teach us the time when sweet charity and mutual helpfulness and prosperity, thrift, and independence shall have become so universal as to leave no room for the exercise of the widest liberality of the private giver, is yet a considerable distance in the future. We have no occasion to inquire into the wisdom of this gift or of the plan adopted for its administration. There is nothing in it which offends against the law, public morals, or public policy. The testator was acting within his undoubted right to select the beneficiaries of his estate, and the law and the courts are bound to respect his clearly expressed wishes.

No sufficient reason is suggested for interfering with the decree of the trial court, and it is hereby—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concur.

LEWIS T. HADDICK, Plaintiff, v. THE DISTRICT COURT OF POLK COUNTY, IOWA, and HON. W. H. McHENRY, one of the Judges thereof, Defendant.

Appeal: SUPERSEDEAS BOND: WHEN JUDGMENT MAY BE STAYED. The
1 right of appeal ordinarily carries with it the statutory right of staying enforcement of the judgment appealed from by the filing of a supersedeas bond, the office of which is to preserve the status quo of the parties; but in case the judgment or order has been previously executed, or is self-executing, there is nothing upon which the supersedeas bond can operate, and the filing of the same in such cases would be inoperative.

Same: CONTEMPT. An order requiring an administrator to turn over
2 certain funds in his hands to another is not a self-executing order, but is an order requiring the administrator to perform an affirmative act, and upon appeal he would be entitled to have enforcement of the order stayed by a supersedeas bond; and he would not be guilty of contempt for failing to perform the order pending the appeal.

Same. An order directing a substituted administrator to set aside a
3 certain sum for the protection of plaintiff, pending his appeal from another order directing him to turn over certain funds in his hands to the substituted administrator, will not justify a judgment for contempt against plaintiff, because of his failure to perform the latter order while his appeal therefrom was pending, and after the giving of a supersedeas bond.

Certiorari to Polk District Court.

SATURDAY, MARCH 14, 1914.

THIS is an original certiorari proceeding in this court, wherein a writ has issued to the district court directing it to certify up its record in a certain contempt proceeding against the plaintiff herein, wherein the plaintiff was adjudged guilty. The proceeding here is in the nature of an appeal

from the order complained of, and casts upon us the duty to review such order and the proceedings leading up thereto. —*Annulled and Reversed.*

B. J. Cavanagh, Parker, Parrish & Miller, and Jacob Sachs, for plaintiff.

George Wambach, R. O. Brennan, and H. W. Byers, for defendants.

EVANS, J.—The proceedings in contempt against the plaintiff were had December 17 and 18, 1913. The preceding history, upon which the contempt proceeding rested, was as follows: Haddick was administrator of the Hans Bohstedt estate pending in Polk county. He became involved in more or less controversy with alleged foreign heirs. His due administration of his office as administrator was also hampered by the fact that his father was a claimant against the estate, and that himself and wife were also claimants against the same. He was at one time peremptorily removed from office by one of the judges of the district court. That order was subsequently annulled by this court as having been made in excess of power, and in disregard of the statute. *Haddick v. District Court*, 160 Iowa, 487. In August, 1913, the plaintiff presented to the court his resignation, and filed therewith his final report. His report was approved in all respects except as to certain specific items of expense incurred by him in the prosecution of the case above cited, and amounting to a total of \$393. These items of expense were not allowed by the district court, and the amount thereof was charged against him. The sum total in his hands, concerning which there was no dispute, amounted to over \$9,000. A new administrator was appointed, and Haddick was ordered to turn over to such person the full amount in his hands, including the disputed items. Thereupon Haddick appealed to this court from the order of the district court refusing the allowance of the dis-

puted items, and filed a supersedeas bond in compliance with the statute, and this was duly approved. He also tendered to the administrator the full amount in his hands, except the amount involved in his appeal, namely, \$393. Thereupon contempt proceedings were instituted against him. He was charged therein with a refusal to comply with the order of the court. He was thereupon cited to appear and show cause why he should not be punished for contempt. He appeared and showed cause as above indicated, namely: That he had appealed to the Supreme Court from the order of disallowance, and that he had duly filed a supersedeas bond, and that the order of the district court was thereby suspended so far as its enforcement was concerned, and that the district court was without power to enforce such order until after disposition of the appeal in the Supreme Court. Upon hearing had, the district court entered an order adjudging the plaintiff guilty of contempt, and ordering that he be imprisoned in the county jail until full compliance was made with the previous order of the court.

I. The defendant concedes that the order of disallowance of the expense items was an appealable order. The appeal, therefore, had the effect to confer upon this court jurisdiction of the subject-matter. It is ordinarily true that, if a party has the right to appeal in any case, he has the statutory right to file a supersedeas bond, and thereby to stay all proceedings, under the order or judgment appealed from, looking to its enforcement. This general rule is not disputed by counsel for defendants.

It is urged, however, that the rule was not applicable to the case under consideration, because the order appealed from was a self-executing order, and could not therefore be affected by a supersedeas bond. It may be conceded that, if the order was self-executing, a supersedeas bond availed nothing. The function of a supersedeas bond is to maintain the status quo, and to supersede enforcement proceedings under the judgment or order. If

1. **APPEAL:** supersedeas bond: when judgment may be stayed.

2. **SAME:** contempt.

the order had been previously executed, there was nothing to supersede. But we do not think counsel's contention can be sustained. A self-executing order has been defined by this court as one which requires "no act of a ministerial or other officer to put it into effect." *Allen v. Church*, 101 Iowa, 116. Generally speaking, a self-executing order presupposes that no act of the defeated party is required in order to render its fruits available to the successful party. A self-executing order is ordinarily one which is injunctive and prohibitive, or one which fixes the status of a party, as in an action of divorce, or in an action to test the right to office, or one which adjudicates the title to property, and especially where a title is quieted in a party in possession. An order which in its nature and its terms is mandatory upon the defeated party, requiring him to perform an affirmative act, is not a self-executing order, for the simple reason that it is not executed at all while the defeated party refuses to perform. In such a case compulsory process is available to enforce performance. That is just what the contempt proceeding was. If the order had been self-executing, there would have been no need of compulsory process.

As to what is and what is not a self-executing order, see the following authorities: *Jayne v. Drorbaugh*, 63 Iowa, 711; *Lindsay v. Clay District Court*, 75 Iowa, 509; *Foster v. Superior Court*, 115 Cal. 282 (47 Pac. 58); *Ex parte Queirolo*, 119 Cal. 635 (51 Pac. 956); *Dulin v. Pacific Co.*, 98 Cal. 304 (33 Pac. 123); *Randles v. Randles*, 67 Ind. 434; *Walls v. Palmer*, 64 Ind. 496.

The conclusion is unavoidable that the plaintiff herein was within his statutory rights in appealing from the order complained of, and in superseding the enforcement thereof by proper bond. If so, he could not be deemed guilty of contempt for failure to perform the order appealed from pending the appeal.

II. It is due to the trial judge to say that before adjudging the plaintiff herein guilty of contempt he first entered

an order that payment of the disputed amount by the plaintiff herein, in obedience to the previous order
3. **SAME.** of the court, should not be deemed to prejudice his appeal to the Supreme Court, or to waive any right which might be found in his favor on appeal. He also entered an order directing the new administrator to set apart \$600 of the moneys of the estate, and to hold the same for the protection of this plaintiff in case he should prevail in his appeal. This order is pressed upon our attention by defendants' counsel at the present time. If the good faith of the trial judge were challenged, or were in issue, this order would doubtless be a complete answer to any such challenge. But the order is in no sense effective in justification of the judgment of contempt. The order itself was without statutory authority. It only improvised another method of protecting this plaintiff in his right of appeal, and tendered it to him in exchange for the statutory method which he had already followed. It follows that the judgment finding the plaintiff guilty of contempt must be annulled, and it is so ordered.—*Annulled and Reversed.*

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

VALLEY NATIONAL BANK, Appellee, v. J. H. COWNIE,
Appellant.

Contract of guaranty: CONSIDERATION: NOTICE OF ACCEPTANCE:

- 1 **WAIVER.** Where the stockholders of a corporation executed a written guaranty for the repayment of loans or credits extended by a certain bank to the corporation, the guaranty to be several and to be measured by the amount of their stock in the corporation, respectively, the guaranty of each in proportion to his interest constituted a beneficial consideration to all; and as the contract expressly waived notice of the acceptance thereof, the failure to give a guarantor notice did not avoid liability.

Same: RENEWAL OF INDEBTEDNESS: DISCHARGE OF GUARANTOR. Where
2 a stockholder's contract of guaranty for loans and credits not exceeding a certain sum in any one year, including renewals, extensions and new loans, the intention being that it should not only cover repayment of the original loans up to the limit stated, but also all indebtedness for the year, a guarantor was not discharged by the mere giving of renewal notes and an extension of time.

Same: DISCHARGE OF GUARANTOR: RENEWAL OF INDEBTEDNESS:
3 PLEADING. The defense by a guarantor that loans were renewed and extended without notice to him must be pleaded to be available.

Same: DISCHARGE OF GUARANTOR: RENEWAL AND EXTENSION OF PAY-
4 MENT. Where a stockholders' guaranty recited that they were interested in securing credit for the corporation, and they severally guaranteed payment of all loans to the corporation to the extent of the value of their stock, including all renewals and extensions, and they severally waived notice of acceptance of the guaranty and all other notices necessary to be given, either before or after the extension of credit to the corporation, their beneficial interest in the corporation rendered them absolutely liable as principals, and they were not discharged by a failure to give them notice of renewals of the indebtedness and extensions of time of payment.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

SATURDAY, MARCH 14, 1914.

ACTION upon a contract of guaranty. There was a general denial and certain affirmative defenses. From a judgment for plaintiff, the defendant has appealed.—*Affirmed.*

C. C. Dowell, for appellant.

Thos. F. Stevenson, for appellee.

EVANS, J.—The plaintiff's action is brought upon the following written contract:

June 3, 1908.

Whereas, the directory board of the Des Moines Corn Milling Company of Des Moines, Iowa, have authorized the

officers of said company to borrow from time to time sums not in excess of thirty thousand dollars (\$30,000) for it; and, whereas, the banks demand security and are unwilling to loan on the credit of said company alone; and, whereas, each of the undersigned is a stockholder of said company and owns the number of shares of its stock set opposite his name below, each of said shares being the par value of one hundred dollars, and is interested in securing credit for said company:

Now therefore, in consideration of the premises and in order to enable said company to secure loans or credit for the sum above mentioned, each of the undersigned agrees to guarantee and does hereby absolutely and without condition guarantee that said company will pay all loans and credits which it may secure from the Valley National Bank of Des Moines, Iowa, when due, according to the terms of the instruments evidencing the same, to the extent of the par value of said stock now owned by him as shown below, said guaranties being several and not joint, and will on default of said company on demand made by said bank, pay said sum to be credited on indebtedness of said company to said bank.

And H. H. Polk and G. B. Hippee hereby absolutely without condition guarantee that they have the power and authority to bind and do hereby bind the estate of Jefferson S. Polk by this agreement, and each of the undersigned hereby waives notice of acceptance of this guaranty and all other notices of every kind necessary or proper to be given either before or after the giving of said credit.

The undersigned also guarantees that said loans have been duly authorized by the board of directors of said company and that it has the legal right to make said loans in the maximum aforesaid.

The aggregate amount of the loans and credits guaranteed hereby shall not at any time exceed thirty thousand dollars, and this guaranty shall cover all loans and credits not in excess of said sum during the year 1908, including renewals, extension, and new loans, the intention being that the guaranties shall not end with the payment of this indebtedness originally incurred up to the limit stated, but shall include all indebtedness up to said limit during the year 1908.

This guaranty shall cover loans made during the year 1908 and no other, and shall not exceed thirty thousand dollars (\$30,000). And the parties hereby further agree to pay

a reasonable attorney fee if suit shall be brought on this instrument or expense incurred in the collection of the amounts agreed herein to be paid.

| Name. | No. of Shares. |
|------------------------------|---|
| N. T. Guernsey. | Ten (10) guaranteeing \$1,000. |
| Estate of Jefferson S. Polk. | Thirty (30) guaranteeing \$3,000. |
| H. H. Polk. | Fifty-one (51) guaranteeing \$5,100. |
| Alice K. Polk. | Ten (10) guaranteeing \$1,000. |
| G. B. Hippe. | Thirty (30) guaranteeing \$3,000. |
| P. J. Mills. | Twenty (20) guaranteeing \$2,000. |
| Chas. S. Denman. | Eighteen (18) guaranteeing \$1,800. |
| D. S. Chamberlain. | Thirty-seven (37) guaranteeing \$3,700. |
| Jansen Haines. | Six (6) guaranteeing \$600. |
| J. B. Weaver, Jr. | Six (6) guaranteeing \$600. |
| Wilton McCarthy. | Six (6) guaranteeing \$600. |
| L. E. Harbach. | Five (5) guaranteeing \$500. |
| J. H. Cownie. | Twelve (12) guaranteeing \$1,200. |
| J. H. Polk. | Thirty-five (35) guaranteeing \$3,500. |
| B. F. Kauffman. | Five (5) guaranteeing \$500. |

The defendant pleaded a general denial, subject to certain specific admissions; pleaded affirmatively a want of notice of acceptance of the guaranty by the plaintiff; and pleaded payment by the principal. The defendant offered no evidence upon the trial. At the conclusion of the evidence, no material fact being in dispute, the trial court directed a verdict for the plaintiff.

The defendant has little standing room for his defense. All that is claimed against him is the amount separately guaranteed by him. No other party to the contract has resisted its obligations. The contract is something more than a contract of mere guaranty; it is signed by the stockholders of the borrowing corporation. The signers purport to be parties in "interest."

The undertaking of each one is measured by the extent of his interest in the borrowing corporation. The borrowing was for the benefit of the guarantors as the owners of the borrowing corporation. Inasmuch as the contract is signed by the owners, the several guaranty of each in proportion to his interest operates as a beneficial consideration to all. The undertaking expressly purports to be "absolutely and without condition." It expressly waives all defenses which might otherwise be available to a mere guarantor. It expressly waives notice of acceptance. This affirmative defense need not be further considered.

Upon delivery of this contract, the plaintiff bank loaned to the corporation \$30,000, in 1908. It amounted, in practical effect, to the borrowing of a working capital by the stockholders. Within less than two years the corporation failed. No part of the principal of the loan was ever paid by the corporation.

2. SAME: renewal of indebtedness: discharge of guarantor.

Its notes were surrendered as they matured, and renewal notes were taken in return upon extended times. Defendant's plea of payment is based wholly upon the formal surrender and cancellation of the original notes. He does not claim that they were paid in any other sense than by renewal notes and by extension of time. He admits the renewals and the extension. The contract sued on provides, in express terms, for this very thing.

Appellant's argument here goes beyond his pleading in the court below. He contends here that he had no notice of the renewals and extension, and that he was therefore released for want of such notice. Such defense is not available to him without pleading it. Code, section 3629; *Bishop v.*

3. SAME: discharge of guarantor: renewal of indebtedness: pleading.

Hart, 114 Iowa, 96.

If he had pleaded it, however, it would be without merit on this record, for the reasons already indicated. Because

of their beneficial interest in the contract, these signers were not "favorites of the law" in the ordinary sense of guarantor or surety. Not only were they beneficially interested, but they were the only persons to be benefited by the loan. The corporation was their own artificial creation, organized for their own profit. As between themselves and their corporation, the corporation was the principal, and each signing stockholder was severally guarantor of a limited amount, which was proportionate to his interest. But, as between them and the loaning bank they severally made themselves to such extent absolutely liable as principals; and there is no principle of law which entitles them to more commiseration from the court than should be extended to any other debtor. Their undertaking was based upon a beneficial consideration coextensive with their liability.

4. SAME: discharge of guarantor: renewal and extension of payment.

The following excerpts from *Bank v. Gay*, 57 Conn. 224 (17 Atl. 555, 4 L. R. A. 343), is quite in point:

Courts, when called upon to construe contracts guaranteeing the faithful discharge of the duties of an office, adhere closely to the letter, for this reason: That the obligor has assumed a burden of responsibility solely for the benefit of another, without compensation or possibility of profit to himself, and therefore the law will add nothing to it by way of presumption. In the case before us the defendant, with others, desired to become a manufacturer, of course, for pecuniary profit. For the purpose, among others, of putting a limit to individual responsibility for losses, they associated themselves under the statute as a joint-stock corporation. Being unwilling individually to contribute the necessary capital from money in hand, they determined to borrow it from the plaintiff. For convenience in the transaction of the business, the money was borrowed upon notes made by the corporation. To avoid the inconvenience of indorsements by several individuals of each of a large number of original notes and the renewals thereof, the obligors made one comprehensive continuing contract of indorsements in the form of a guaranty under their respective hands and seals. In effect, there-

fore, the defendant borrowed money for himself and his associates; he received and used it for his and their profit; and still has it in possession. It is difficult therefore to perceive any distinction between his case and that of any other borrower; . . . difficult to see any reason why he should ask, or the court should grant, the special protection of the law applicable to that relation. It may well be presumed that obligors would desire to limit the time during which they would be bound for the faithful performance of the duties of an office by another. But, inasmuch as both morally and legally it is the duty of every man to repay money borrowed for his own use and profit, it must be the presumption that these obligors intended to do so; that they intended to pay it to the plaintiff, or even to such person or other corporation as should legally become the assignee of its right to receive. . . . Again, the letter of their obligation has this, and no other, limitation, namely: They guarantee the repayment of money, to a limited amount, which the plaintiff should thereafter lend to the corporation, reserving the right to terminate the contract at will. . . . Moreover, in the second paragraph of its reply, the plaintiff alleges that the notes upon which it asks a judgment are renewals in full, or extensions of such part as has not been paid, of notes made before the expiration of the limit first put upon its existence. To this the defendant demurred, averring that the allegation is immaterial, for the reason that, if, after the day of expiration of the first limit to the corporate life of the plaintiff, it renewed any notes, such renewal would of itself discharge the defendant from liability. But by the bond the obligors guaranteed 'the full, prompt, and ultimate payment of all promissory notes.' Beyond doubt it was in the contemplation of both parties that the relation of borrower and lender thus formally established would continue during a long period of time—for years. . . . But, however that may be, it is beyond doubt that both parties contemplated that, although the lending by the plaintiff would be in form upon the comparatively short time customary to a bank, yet, in fact, the borrower would long continue to be such by renewal or extension. Therefore the bond is framed to meet such contingency. To guarantee 'full and prompt' payment would meet the case of a note, on usual bank time, actually to be paid in full at maturity. To guarantee, in addition to 'full and prompt' pay-

ment, the 'ultimate' payment can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals and extensions.

Apart from the question of beneficial consideration, however, the very terms of the contract will bear no other construction than that put upon it by the trial court.

In *Savings Bank v. Boddicker*, 105 Iowa, 548, a guaranty contract was construed which was less emphatic and specific in its terms than the one under consideration. Such contract contained the following provisions: "It is the intention and purpose of this instrument or obligation to fully protect and indemnify the said Benton County Savings Bank or its assigns against any and all loss by reason of the failure of the said Miller & Sons to pay their indebtedness now owing (or which may be contracted hereafter) to the said Benton County Savings Bank." Construing such provision this court said:

The evidence tended to show that the time of paying some of the indebtedness of J. S. Miller & Sons which existed when the bond in suit was given was afterwards extended, and that new indebtedness was thereafter contracted; and it is insisted that the bond does not cover either class of indebtedness. The bond, in terms, covered the indebtedness of the firm which it owed to the plaintiff at the time the bond was given, or which should thereafter be contracted. . . . But all the provisions of the bond must be construed together, and, when that is done, it is clear that the bond was intended to secure the payment of the indebtedness of the firm to the plaintiff which existed at the time the bond was given, and also that which should be created by contract thereafter. The provisions were sufficiently broad to include renewals of existing debts, as well as those which should otherwise accrue, for the continuance of the business of the firm was evidently contemplated, and contracts for the extension of existing debts were as much within the scope and purpose of the bond as were those which should be thereafter created.

Somewhat in point also are the following cases: *Hoyt v. Quint*, 105 Iowa, 444; *Iron Co. v. Cutlery Co.*, 130 Iowa, 736;

Merritt v. Haas, 113 Minn. 219 (129 N. W. 379; Id., 106 Minn., 275, 118 N. W. 1023, 119 N. W. 247, 21 L. R. A. (N. S.) 154); *First National Bank v. Wunderlich*, 145 Wis. 193 (130 N. W. 98).

The judgment below was right, and it is accordingly
—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

JOHN M. GINGERICH, Plaintiff, and JOEL GINGERICH, GEORGE RHODES, LENA SNIDER, KATIE RHODES, and SUSAN YODER, Interveners, Plaintiffs, Appellants, v. JOSEPH D. MILLER, PETER D. MILLER, JOHN D. MILLER, and SAMUEL D. MILLER, Defendants, Appellees.

Conveyances: MENTAL INCAPACITY: FRAUD: EVIDENCE. In this action
1 to set aside a deed on the ground of mental incapacity, fraud and undue influence, the evidence is held insufficient to sustain the allegations of the petition.

Same: CONSIDERATION. Where a testator gave his widow the life use
2 of the homestead, with the remainder to his sons by a former wife, a conveyance by the widow to the remaindermen was an election to take under the will, which was a sufficient consideration for the deed, she having at the time an actual life expectancy of several years.

Same: CONVEYANCE OF LIFE ESTATE: FRAUD. A conveyance by the
3 widow of the homestead, in which she was given a life estate, to the remaindermen in conformity with the provisions of the will was not a fraud upon her children by another marriage; their interests not being involved in a legal sense.

Appeal from Johnson District Court.—HON. R. P. HOWELL,
Judge.

SATURDAY, MARCH 14, 1914.

SUIT in equity to set aside a deed on the ground of mental incapacity of the grantor, and on the ground of fraud, undue

influence, and duress. There was a decree for the defendants, and the plaintiff and interveners appeal.—*Affirmed.*

A. E. Maine and Ranck & Messer, for appellants.

Wade, Dutcher & Davis, for appellees.

EVANS, J.—The plaintiff and the interveners are the six children and heirs at law of Mary Miller, who died in 1911. At the time of her death, and for three months previous, she was the widow of D. P. Miller, who died testate on March 21, 1911. The defendants are the four sons and only heirs of D. P. Miller, being his children by a former marriage. D. P. Miller and Mary Miller were married in 1885; both having children by their former marriages. Mary Miller had been twice married previously, and had six children, ranging in age from five years upwards, the younger of which became members of the new household. The land involved in the action consists of forty acres, and was the homestead of D. P. Miller and Mary Miller from the date of their marriage until the death of the husband, and continued to be the homestead of Mary Miller up to the time of her death. It comprises all the real estate owned by D. P. Miller at the time of his death. The will of D. P. Miller, made in 1908, provided that the widow should take such homestead during her life, and that the remainder should go to the four sons, the defendants herein. The deed complained of in this case conformed in its provisions to such provisions in the will.

The grounds of attack laid in the petition are (1) that at the time of the execution of the deed Mary Miller was insane, being wholly deprived of her reason, and was therefore incapable of any binding act on her part; (2) that the deed in question was obtained from her by undue influence, fraud, and coercion or duress.

We are clear that a fair consideration of the evidence pro and con does not sustain the claim of insanity. In view of our

discussion of the second ground, we will not enter into detailed discussion of the first.

Even though Mrs. Miller was not insane, her actual condition, both mental and physical, whether weak or strong, still remains to be considered as bearing upon the question of undue influence, fraud, or duress. In
1. CONVEYANCES : of undue influence, fraud, or duress. In
mental inca- December, 1910, Mrs. Miller's oldest daughter
pacity : fraud :
evidence. (Mrs. Yoder) and her family came to live in the Miller home. In January following Mrs. Miller was sick for three or four weeks with pneumonia. On March 21st Mr. Miller died after an illness of a little more than a week. Mr. Miller's four sons attended the funeral. Three of them were nonresidents. Joe lived on his farm in the home community. Peter lived in Colorado, John in Oklahoma, and Samuel in Florida. After the funeral they remained for several days looking into the business of the estate. Joe was named as executor in the father's will. On Friday, March 24th, the will was read at the home. On Monday, March 27th, the deed complained of was executed. It was executed in the "sitting room" of the home, and was witnessed by Mrs. Miller's son-in-law, Yoder, and one Skola, a banker. No direct evidence is introduced of any fraud, or undue influence, or duress. The circumstances relied on in proof of such claim are that there was no consideration for the deed; that Mrs. Miller was physically and mentally weak normally, and was still more so by reason of her previous sickness, and her grief over the loss of her husband; that her daughter, Mrs. Yoder, was in the kitchen of the house engaged about her work, and was not invited in, but, on the contrary, the door between the sitting room and kitchen was closed; that the deed was prepared in advance in typewriting by Skola before coming to the Miller home, and that it was later executed as so prepared; there were other papers executed at the same time which are not directly involved in this suit, but have an incidental connection with the subject-matter, and these also were prepared in advance in typewriting by Skola.

As to the consideration, the deed recited a nominal consideration of \$1. The body of the deed, however, shows that the real consideration was mutual between the grantor and grantees, and that the grantees only took the remainder in fee, whereas, the grantor took a life use of the tract. One of the fallacies of appellant's argument is that it has assumed that the life use of the whole was without value, and that the conveyance by the grantor was a mere gift. Under no circumstances could Mrs. Miller have retained a fee in one-third, and yet retained a life use of the whole. She had the right of election, and the execution of this deed amounted to no more than such right of election. If she elected manifestly to her own disadvantage, it is a circumstance proper to be considered on the question of fraud or duress. She was seventy years of age at the time of the death of her husband. Her natural expectancy was about nine years. From the point of view of March 27th, therefore, the life use of the whole premises was of very substantial value, nor can it be said upon this record that it was of any less value than the one-third in fee. The consideration for the deed was therefore ample, and furnishes no ground of attack.

As to the immediate circumstances surrounding the execution of the deed, Mr. Skola was the banker of Mr. and Mrs. Miller, and was one of the witnesses to Mr. Miller's will. He prepared the papers at his bank before coming, having been informed by one of the Millers what they proposed to do. Mrs. Miller was advised of what she was signing, and that the effect of the papers was the same as the will. Mr. and Mrs. Yoder testified that the door between the sitting room and kitchen was closed for twenty minutes while three of the brothers and Skola were in the sitting room with the mother. Nevertheless Yoder was called in to witness the execution of the papers, and he also understood that they were in conformity with the will. The other papers heretofore referred to conformed to other provisions of the will in behalf of Mrs. Miller. The will provided that she should take one-third of

the live stock and \$1,000. The sum of \$1,000 was paid to her on March 27th, and her receipt taken therefor. An agreement was also signed providing for a public sale of the live stock. This was subsequently held, and one-third of the proceeds was paid to Mrs. Miller, viz., \$243. The evidence shows that Mrs. Miller was acquainted with the terms of her husband's will during his life, and was then satisfied therewith. It further shows that subsequent to March 27th she spoke of the settlement between her and the Millers, and expressed herself as satisfied therewith.

Mrs. Miller and her husband were members of a religious sect known as Amish Mennonites. They were German people, and she preferred the German language. She could not read English, nor could she sign her name. She had a deformity known as a "hump-back." She weighed about 125 pounds. That she was not as strong, either physically or mentally, after her January sickness, and after the death of her husband, may be assumed. This, however, avails little without showing that she was in some manner over-reached. Counsel for appellants measure the benefits accruing to Mrs. Miller under the contract in the light of the subsequent fact that she died on July 4th. This is not the proper criterion. So far as the parties knew on March 27th, she would probably live about nine years, and might live many years longer.

It is charged in the petition, and urged in argument, that the deed under consideration was a fraud upon the children of Mrs. Miller. This contention is clearly wrong, and fur-

3. SAME: convey-
ance of life
estate: fraud.

nishes no ground of attack upon the deed. The interests of her children were not involved in a legal sense. What might have been to their interest might also have been to her detriment. It was her legal right to consider her own interest alone. It was also her privilege to regard the wishes of her husband and the moral claims of his family by the first marriage. The property involved was acquired during the first marriage. She was not legally bound to respond to these considerations; neither was

she forbidden to adopt a conscientious course from a moral and religious point of view. She was not otherwise destitute in her occupancy of the homestead; the inventory of her estate showing money and credits to the amount of more than \$2,000.

Giving the evidence as a whole our most careful consideration, we think the conclusion is unavoidable that no fraud or duress is shown. The decree of the trial court must therefore be—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. A. MANIGAN, Appellant.

Criminal law: FLIGHT: EVIDENCE: INSTRUCTION. Where the evidence

- 1 simply showed that defendant when arrested was found in a shanty belonging to another at the place where he had formerly worked, and that the door was locked by the owner of the shanty, it was insufficient to warrant an instruction that if defendant fled and concealed himself such evidence of flight could be considered as *prima facie* evidence of consciousness of guilt.

Same: EVIDENCE: EXAMINATION OF WITNESSES: LEADING QUESTIONS.

- 2 Where a defendant seeks to negative evidence of the state by testimony directly responsive thereto, counsel may direct the attention of the witness to the very statements proposed to be negated, and the examination will not be considered as leading and suggestive.

Same: MURDER: PREMEDITATION: EVIDENCE. Where defendant was

- 3 charged with murder, which includes the element of premeditation, he was entitled to have any purpose for which he was carrying a deadly weapon, consistent with the absence of premeditation, considered by the jury. Thus in support of the claim that the shooting of deceased was accidental, and in response to evidence by the state that he had threatened to shoot deceased, and that he had carried his pistol during all of the day previous, and he had stated on cross-examination that he did not always carry his pistol, he should have been permitted to state why he was carrying it at the time in question.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

SATURDAY, MARCH 14, 1914.

THE defendant was prosecuted under an indictment for murder in the first degree. There was a verdict of guilty as charged, and a judgment thereon fixing the penalty at life imprisonment. The defendant appeals.—*Reversed and Remanded.*

J. B. Rush and J. F. Conrad, for appellant.

George Cosson, Attorney General, for the State.

EVANS, J.—The defendant was charged with the murder of his wife on the night of February 24, 1913, at their home in Des Moines. It is undisputed that the defendant's wife died from septic poisoning resulting from a gunshot wound at the knee, and that the injury was inflicted by the defendant. The claim of the defendant is that the shooting was purely accidental, and there is much in the circumstances to support this claim. The defendant is a colored laborer, and manifestly belongs to that lower stratum of the colored race to whom freedom has not proved uplifting, but, on the contrary, has been a wide-open door to dissipation. Of the same class are the witnesses who testified to the circumstances preceding the shooting. It is a circumstance against the defendant that these witnesses were his companions, and they were without apparent motive of hostility to him. There is, however, considerable inconsistency and self-contradiction in their testimony on behalf of the state. The defendant is a coal miner who had been out of work for several months prior to the time of the shooting by reason of some disability. He was suffering from an injured eye, and also was carrying his arm in a sling. The shooting occurred about 2 o'clock in the morning; the defendant arriving home at that time. His own story is that he was undressing, and was having difficulty in removing his shirt because of his lame arm, and that his wife

was assisting him, that he pulled the revolver out of his hip pocket to put it away, and that it was in some manner discharged, as he supposed, at the moment, into the floor. The ball, however, penetrated the leg of the wife, passing in a little above the knee, and passing out three or four inches below the knee. It is undisputed that defendant declared the shooting an accident at the time, and manifested sorrow over it. It appears, also, from the testimony for the state that the shooting occurred while the defendant was in the act of undressing, and after his shirt had been partially removed. The damaging testimony against him was to the effect that he had been in the house earlier in the evening, and had quarreled with his wife, and that he had gone out after threatening to get his "gun," and to shoot her.

I. Counsel for defendant urge that the evidence was wholly insufficient to sustain a verdict for first degree murder. They also urge that the defendant was unduly restricted by the trial court in the admission of testimony in his behalf, and, further, that the trial court erred in the giving of certain instructions.

1. CRIMINAL LAW:
flight: evi-
dence: instruc-
tion.

We will direct our first attention to instruction 11½, which was as follows: "If you shall find from the testimony in this case that after the assault, if any, was committed by the said defendant upon the said Mrs. A. Manigan, that the said defendant fled, and concealed himself, such evidence of flight may be considered by you as *prima facie* evidence of a consciousness of guilt."

The complaint is that there was nothing in the record to justify the giving of this instruction. It is undisputed that the defendant was first arrested for the assault immediately after the shooting on the same night, and that he gave bail. The particular circumstances of that arrest are not in evidence. A month later, and after the death of the wife, the grand jury returned an indictment, and a warrant was issued thereunder. The arrest of the defendant under this warrant was made by Deputy Sheriff Sunberg. If there was evidence

to justify the instruction above quoted, it must be found in the testimony of Sunberg, which was as follows: "I arrested Bud out at Norwoodville, northeast of the city four or five miles. He was in a little shanty that was locked by a padlock. We knocked on the door, and Manigan answered, and asked who was there. I told him, and he opened the door. Manigan said a man by the name of Baker batched there, and had locked the door before he went to work."

The foregoing from appellant's abstract is amended in appellee's abstract by adding as follows: "We stood around there awhile, and heard a little noise in there, and this colored gentleman that was with us rapped on the door, and Manigan answered and asked who was there, and he told his name to him. Told him to open the door, and Manigan stuck the key from under the door outside, the padlock key, and he opened the door."

It appears that the Norwoodville Coal Company was the defendant's last employer. The time of day or night when the arrest was made does not appear. It does not even appear that the defendant knew of the indictment. Not a circumstance is shown other than above set forth tending to show flight or concealment. The defendant was out on bail under the first arrest, and was in no manner defaulted. The mere fact that the defendant was in a house in the vicinity of a coal mine where he had worked when he worked at all has in it no suggestion of flight or concealment, nor did the fact that the door was locked of itself prove anything in that direction. The lock is the universal protection even of the occupant of the "hut" against the petty thievery that would despoil him of what little he had. The fact that the house was a "shanty" adds nothing to the force of the circumstance. It was in keeping with defendant's station in life. In this case the shanty belonged to another occupant, and its door was locked by him. We think, therefore, that this evidence was wholly insufficient to permit the jury to consider it as "prima facie evidence of guilt."

II. As heretofore indicated, the witnesses for the state testified that earlier in the evening, and a few hours prior to the shooting, the defendant had threatened to get his gun, and to shoot his wife. They also testified that

2. SAME: evidence: examination of witnesses: leading questions. one of the persons present at the time of such threat was Alice Pitman. This person was called as a witness for the defense, and an attempt was made to show by her that she heard no such threat. The following question was put to her: "Did you hear him say anything about going to get a gun?" On objection by the state the trial court ruled out the question, on the ground that it was "leading and suggestive." The question was directly responsive to the testimony introduced by the state. It was directed to specific affirmative testimony given on behalf of the state. It was the right of the defendant to negative such testimony. For that purpose the counsel of defendant had a right to direct the attention of the witness to the very statements proposed to be negatived. The question put in the case before us was in conformity with the rule, and was not leading. There was therefore error in the ruling. We would not, however, feel justified in reversing on this ground. Large discretion is vested in the trial court as to the form of questions, and it is the duty of counsel to adapt themselves as far as possible in good faith to the ruling of the trial court as to the form of a question, and to use reasonable diligence to elicit the proposed testimony by other questions conforming to the views of the court. This does not mean, however, that the defendant was bound to make the witness his own as to any fact except the particular fact inquired about.

Counsel for defendant abandoned the attempt to elicit the testimony upon the single adverse ruling of the court, and the record gives us little assurance, if any, that, if the witness had been permitted to answer the question put, she would have negatived the testimony on behalf of the state.

III. The defendant testified, not only that he made no threats against his wife when at home earlier in the evening,

but that in fact he had his pistol in his pocket at that time,
and had had the same in his pocket all day.

3. **SAME: murder:**
premeditation: On cross-examination he testified that he did
evidence.

not always carry the gun. He attempted, also, to explain why he was carrying it at the time. This explanation was stopped and ruled out on objection by the state; no ground being specified. On redirect examination he was asked by his counsel to explain his reason for carrying the gun. Objection to this line of evidence was sustained as being incompetent, irrelevant, and immaterial. The ruling was erroneous. The charge of murder in the first degree included the element of premeditation. In order to render the verdict in this case, the jury must have found premeditation. The question of preparation for the deed inhered in this element. The evidence on behalf of the state tended to show premeditation and preparation. It was not only competent and material but highly important to the defendant to negative such testimony and the inferences which might arise therefrom. If he had a reason for carrying the revolver which was consistent with his innocence, or consistent with the absence of premeditation or preparation for an assault upon his wife, it was his right to have it submitted to the consideration of the jury.

For the reasons indicated, the judgment of conviction must be reversed, and the case remanded for another trial.

In view of our grave doubt of the sufficiency of the evidence to justify a verdict for first degree murder, we are not averse to granting a new trial upon the errors indicated. The defendant is not a valuable member of society. The verdict doubtless drew no tear from any eye save his own. He would doubtless fare as well in the penitentiary, and perhaps better, than in any place he may ever make for himself. But his right to a fair trial is no less sacred than that of the man of substance and of friends.—*Reversed and Remanded.*

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

ANNA MARIE SAGEN and RANDINA NELSON, v. GUDMAN GUDMANSON, Appellant; PETER ANDREW NELSON, Appellee; MOLLIE NIKKOLINE NELSON, Appellee; RAGNILD GUDMANSON, Appellant, and N. B. NELSON, Appellee.

Partition: PRIOR SETTLEMENT: EVIDENCE. In this action to partition
1 estate lands the evidence is reviewed and held insufficient to show
that a family settlement either related to or affected the title to the
real property.

Co-tenancy: ADVERSE POSSESSION. The possession of one co-tenant will
2 be presumed to be for the benefit of all, in the absence of a contrary
statute; and will be regarded as the possession of all until by some
act or declaration the interests of the others are repudiated.

Same. To warrant the presumption of disseisin by a co-tenant the
3 adverse holding must be by some act, or series of acts, for such
length of time and under such circumstances as will indicate a
purpose to occupy the premises to the exclusion and denial of the
rights of the other co-tenants, who must have been aware of such
intent and have acquiesced therein.

Same. Entry and possession by one co-tenant inures to the benefit of
4 the others, not only as between themselves but as to strangers also.
In the instant case the evidence is held insufficient to show adverse
possession by one co-tenant.

Same: IMPROVEMENTS: ESTOPPEL. The making of improvements by a
5 co-tenant in possession without advising with the other tenants is
not necessarily inconsistent with occupancy as a co-tenant; and
failure of the other tenants to make objection to the improvements
will not as a matter of law estop them from asserting that they
were not made under an adverse claim.

Same: LACHES. Co-tenants may rely on the good faith of the one in
6 possession, and that his acts are not hostile to their interests: and
they will not be guilty of laches in so doing, which will bar their
rights in the property, unless the delay equals the period of limita-
tions.

Same: IMPROVEMENTS: COMPENSATION. It is only in exceptional cases
7 that a co-tenant may voluntarily burden the property with improvements to the expense of the other tenants; and especially when the rents and profits were ample to meet such expenses

Same: RENTS AND PROFITS: ACCOUNTING. A co-tenant in possession,
8 not having leased the premises or distinctly asserted ownership of the entire estate, cannot be required to account for rents and profits, but after ouster must account therefor.

Appeal from Worth District Court.—HON. J. J. CLARK, Judge.

TUESDAY, MARCH 17, 1914.

SUIT in partition, in which defendant Gudman Gudman-son asserted entire ownership, resulted in decree substantially as prayed. He appeals.—*Affirmed.*

T. A. Kingland, for appellant.

Oliver Gordon and M. H. Kepler, for appellees.

LADD, C. J.—Andreas Gudmanson died intestate March 5, 1886, leaving him surviving his widow, Ragnild Gudmanson, and two children, Gudman Gudmanson and Mollie Nelson. The latter has since deceased, May 10, 1895, leaving four children, Anna Maria Sagan and Randina Nelson, the plaintiffs, and Peter Andrew and Mollie Nikkoline Nelson, minor defendants, and her husband, N. B. Nelson. The deceased, Andreas Gudmanson, owned eighty acres of land at the time of his death, five acres of which has been sold since, and on February 26, 1896, his widow conveyed all her interest in the premises to Gudman Gudmanson. In this suit the plaintiffs allege the children of Mollie Nelson are entitled to one-eighth thereof each, and Gudman Gudmanson one-half, and pray for partition and an accounting of rents and profits. The defendant, Peter Andrew Nelson, being a minor, answered by guardian *ad litem*, in demanding the relief sought in the peti-

tion, as did Mollie Nikkoline Nelson, who attained her majority by marrying Myhre since the beginning of the action. N. B. Nelson filed a similar answer. Gudman Gudmanson, who for convenience may be designated the defendant, interposed the defenses that: (1) By an oral settlement March 16, 1887, of all the parties interested, he became owner of the premises in controversy; (2) had occupied them adversely ever since; (3) that plaintiffs and other answering defendants, having allowed him to make improvements without objection, are estopped from setting up any claim to the land; and (4) ought not to be permitted to do so because of laches.

Upon the death of Andreas Gudmanson, title passed *eo instante* to his widow and two children, Mollie Nelson and Gudman Gudmanson. The widow did not elect to take the forty acres upon which she lived as a homestead, so that each became owner of an undivided one-third thereof and tenants in common, and, unless Mollie Nelson was divested of her estate prior to her death, her share descended to her surviving husband and children, the former taking one-third thereof, or one-ninth of the entire estate, and the latter one-ninth thereof, or one-eighteenth of the entire estate each. Was Mollie Nelson or those entitled to take under her ever divested of the title?

I. Did defendant acquire the farm by virtue of a family settlement and a division of property in pursuance thereof?

At the time of Andreas Gudmanson's death the forty acres on

which he lived, and known in the record as the west forty, was incumbered for \$200, and then worth about \$16 per acre. He had bought

1. PARTITION:
prior settle-
ment: evidence.

eighty acres next to it for \$1,000, on which \$200 or \$300 was paid. Of this he had borrowed \$100 of Soly. This was repaid to Soly by the son, who also paid the funeral expenses and some other items of indebtedness. Subsequently one forty of this eighty acres was sold for \$400, and the proceeds applied on the incumbrance on what is known as the east forty. According to defendant's testimony deceased left "about twenty head of cattle, two old horses, the household goods, no ma-

chinery apart from an old binder." Defendant then lacked twenty-two days of being sixteen years old. His sister was older, and married Nelson in the fall of the same year, and lived with the widow and son about two years. On March 16, 1887, a division of the personal property was made, at which Knut Knutson was present, but he did not recollect what was said, though he prepared two notes of \$105 each to the widow, one of which was signed by Gudmanson and the other by Nelson which were intended as receipts showing that each had received half of the cattle not retained by the widow. The widow testified that there was an agreement to divide the personal property so that the children would take equal parts.

Q. Well, how was the property divided at that time? A. There wasn't anything else to divide, only some things in the house and that outside, the cattle and such. My daughter Mary got nine head of cattle; they got some things from the house at this time and afterwards. Q. What did you get when the property was divided? A. I got two of the oldest cows and the team, and they were not divided because they thought they belonged to me. Q. Was there anything said about the land? A. No, not that I remember or heard anything about. Q. Did you ever divide the land? A. I did not divide it any other way, only I thought the 40 I was on was mine, and the other 40 they should have together, Mary and Gudman. Q. Upon what conditions, if any, should they have it? A. They agreed that they should have it together, and the one that could pay it should have it. Q. Well, who has paid for this land that was not paid at the time he died? A. It is we that have paid it, Gudman. Q. Has Nick Nelson or his wife while she lived ever paid anything on this land? A. No.

Other evidence confirms her testimony that the division of the personal property had no connection with what may have been said concerning the realty. The defendant testified that in 1888 he and Nelson worked the farm together, and that "it was the understanding that we should work together and pay for it. We commenced the second year and worked

it on that plan." According to this witness, the only explanation Nelson gave on moving away was that "working the land didn't pay," though he had contributed \$50 (Nelson says \$100) toward a \$100 payment on the mortgage on the east forty acres. Whether this was repaid him is in dispute, defendant saying that he did so by doing some breaking and furnishing him a cow (though unable to state how many acres were broken, or definitely the price of it, save about \$3 per acre, or that of the cow) while defendant swore his mother-in-law gave him the cow, and that he worked for defendant in return for part of the breaking at least. Nelson denies that anything was ever said about the land at the time the personalty was divided; and, when he talked with defendant and his mother some time after his wife's death concerning the interest of his daughters in the land, neither of them claimed that defendant had acquired it under any agreement such as the widow testified to, nor did they deny the interest of said children in the land. It may be that there was such an understanding between Nelson and defendant as the latter testified, even though he was then but eighteen years of age, but the contention that Mrs. Nelson agreed that the one who paid for the east forty should have it we think is not established by the preponderance of the evidence. The widow asserted and Nelson denied, and the story of the latter seems the more consistent with the subsequent conduct of the parties and Knutson's failure to remember anything that was said about the land. The family settlement in no manner affected the title to the realty.

II. The defense of adverse possession is equally futile. The possession of one tenant in common is presumed to be for the benefit of all, and will, in the absence of statute to the contrary, be regarded as the possession of all the cotenants until rendered adverse by some act or declaration by him repudiating their interest in the property. *Weare v. Van Meter*, 42 Iowa, 128; *Bader v. Dyer*, 106 Iowa, 715; 38 Cyc. 21. In other words,

2. CO-TENANCY:
adverse pos-
session.

there must have been an ouster of the cotenant in order to set the statute of limitations in motion. Nothing of an affirmative nature was done by either defendant or his mother to indicate any claim of either to the entire estate. If the latter thought she owned the west forty acres, the evidence fails to show that she asserted this to her daughter, heirs, or to the neighbors. If the neighbors knew all about it, as she testified, the record does not indicate that the cotenants were advised of this, or of facts that should, in the exercise of reasonable diligence, have led to its discovery. *Knowles v. Brown*, 69 Iowa, 11, and like decisions, then, are not in point. The same is true of any claim made by defendant. If there was a disseisin of the co-tenant, then this must be inferred from continuous possession from 1888, when Mrs. Nelson and husband moved from the land, until this suit was begun in 1909, a little more than twenty years, the appropriation of the rents and profits during that time and the erection on the premises of buildings of the value of about \$1,500, and all this with the knowledge and without objection by the co-tenants.

Many decisions are to the effect that the disseisin of co-tenants may not be inferred from exclusive and silent possession alone of a tenant in common, however long continued and that this will not constitute *prima facie* evidence thereof. *Reed v. Bachman*, 61 W. Va. 452 (57 S. E. 769, 123 Am. St. Rep. 996); cases collected in note to *Joyce v. Dyer*, 109 Am. St. Rep. 620. Expressions to the contrary are to be found in several of the decisions of this state, but these do not seem to have been necessary to the conclusions reached. The question is not specifically presented, and as its determination is not essential in this case, we are inclined to pass it until fully argued, for in any event possession was not continued for such a length of time by Mrs. Gudmanson and defendant, nor under such circumstances, as that an ouster or disseisin should be inferred.

In *Flock v. Wyatt*, 49 Iowa, 466; exclusive possession for

seventeen years was held insufficient to warrant such an inference, and a like conclusion was reached in *Bader v. Dyer*, 106 Iowa, 715, where possession was continued thirty-two years, though without the knowledge of co-tenants. Twenty years was adjudged insufficient in *Iddings v. Cairns*, 2 Grant, Cas. (Pa.) 88, and twenty-seven years in *Warfield v. Lindell*, 30 Mo. 272 (77 Am. Dec. 614). But ouster was inferred from forty years possession in *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 632 (16 Am. Dec. 454), and also in *Doe v. Prosser*, Cowp. 217, where there were thirty-six years of undisputed possession, Lord Mansfield saying: "In this case . . . no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of a title in them or in those under whom they would now set up a right. I am therefore clearly of opinion that an undisturbed and quiet possession for such a length of time is sufficient ground for a jury to presume an actual ouster."

In *Chambers v. Bedell*, 2 Watts & S. (Pa.) 225 (37 Am. Dec. 508), peaceable and exclusive enjoyment of land for fifty years was held to be sufficient to carry the issue as to ouster to the jury. For other cases, see annotation to 109 Am. St. Rep. 620. In North Carolina, from exclusive and peaceable possession for twenty years, ouster at the original taking is inferred and title by adverse possession upheld in analogy to the statute of limitations barring title. *Dobbins v. Dobbins*, 141 N. C. 210 (53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682).

But there seems no sufficient ground for fixing an arbitrary limit, as is decided by the great weight of authority, and

3. SAME. the period essential necessarily depends on
 the circumstances of the particular case.

Joyce v. Dyer, 189 Mass. 64 (75 N. E. 81, 109 Am. St. Rep. 603), and cases collected in note.

In order to warrant the presumption that there has been a disseisin of co-tenants, the taking of possession and holding

it against them must be by act, or series of acts, for such length of time as and under circumstances to indicate a purpose to occupy the premises to the exclusion and denial of the right of the co-tenants, and the latter must have been aware of this and have acquiesced therein. Men do not ordinarily sleep on their rights, and the fact of long possession under circumstances that their right would have been asserted long before gives rise to the presumption that actual proof of the original disseisin has been lost.

In determining whether this has happened, however, sight must not be lost of the relationship of the parties, that though they hold their estate by several and distinct titles, this is by

4. SAME. unity of possession; for none of them can know their own severalty, and an entry or possession by one of the tenants inures to the benefit of his co-tenants, not only as it concerns themselves, but also as to strangers. *Dobbins v. Dobbins, supra*. An ouster or disseisin of a co-tenant in such a case is an act of aggression on the property of another, and for this reason is not too readily to be inferred. Reverting to the facts of this case, it will be recalled that the widow remained on the premises with defendant, then a minor of sixteen years. The daughter married shortly afterwards, remained on the premises for two years, when her husband seems to have discovered that both he and defendant could not thrive on an eighty-acre farm, and quite naturally they, rather than the mother and minor son, moved elsewhere. Such minority and the care of the mother furnishes a satisfactory explanation of the daughter interposing no objection to the occupancy prior to her death in December, 1895. See *Zunkel v. Colson*, 109 Iowa, 695. All of her children were then minors, and when Nelson asserted to defendant and his mother they had an interest in the land, neither disputed him. The improvements made by defendant were essential to the enjoyment of the use. Two of the children were not of age when suit was begun, and the others but twenty-two and twenty-four years of age, respectively. One of them had made her home

with defendant and his mother for ten years, and this in connection with their relationship furnishes some explanation of the hesitation and delay about asserting any right to their interest in the land in court. They should not be held to have been ousted from their inheritance. The defense of adverse possession was not established.

III. The improvements were made on defendant's own motion, and without consulting his co-tenants. As making them when enjoying the rents and profits derived from the

estate was not necessarily inconsistent with his
 5. **SAME: improve-ments: estop-pel.** occupancy as a tenant in common, his co-tenants were not estopped by standing by and interposing no objection thereto. The most that can be said is that this was a circumstance to be given more or less weight in determining whether there was a disseisin.

IV. Claimants were not guilty of laches. They had the right to rely on the fidelity of their co-tenants until advised in

some way of disloyalty to their interests, and
 6. **SAME: laches.** no reason appears for applying this doctrine within the period of the statute of limitations. *Reed v. Bachman*, 61 W. Va. 452 (57 S. E. 769, 123 Am. St. Rep. 996).

V. Objection is made to the decree for that no allowance was made appellant for improvements. Only in exceptional cases is a tenant in common permitted to burden the title with

expenses of this kind, and there is nothing
 7. **SAME: improve-ments: compensation.** in this case to bring it within the exception.

Frye v. Gullion, 143 Iowa, 719; *Cooper v. Brown*, 143 Iowa, 482; *Ward v. Ward*, 40 W. Va. 611 (21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911), and exhaustive note. According to the evidence, the rents and profits derived by appellant from the use of the estate were ample to meet all such expenses besides paying taxes and discharging the incumbrances, and there was no error in not allowing for improvement. *Ruffners v. Lewis' Ex'rs*, 7 Leigh (Va.) 720 (30 Am. Dec. 513).

Appellant was not required to account for rents and

profits prior to the beginning of the action, for he occupied the premises without leasing to others. *Reynolds v. Wilmeth*,

45 Iowa, 693; *Varnum v. Leek*, 65 Iowa, 751;
 8. SAME: rents and profits: accounting. *Belknap v. Belknap*, 77 Iowa, 71. In *German v. Heath*, 139 Iowa, 52, the tenant leased the

estate to others, and for this reason was held to account. In answering appellant distinctly asserted ownership of the entire estate there by excluding his co-tenants from possession with him to which they were entitled, and from that time on, as this amounted to an ouster, he was liable to account. *Sears v. Sellew*, 28 Iowa, 501; *Noble v. McFarland*, 51 Ill. 226; *Dodge v. Davis*, 85 Iowa, 77. See cases collected in note to *Gage v. Gage*, 28 L. R. A. 832.

We discover no error in the record, and the decree is—
Affirmed.

DEEMER, GAYNOR, and WITHROW, JJ., concur.

ROBERT DICKINSON, Appellant, v. IRA D. DAVIS, Defendant
 and Appellee; CENTRAL STATE BANK, L. M. DARLING and
 VICTORIA C. DARLING, Garnishees, Appellees.

Garnishment: LIABILITY OF GARNISHEE. The liability of a garnishee
 1 is no greater than that of the judgment debtor: and in the absence
 of some fault on his part he will not be put in a position where
 he may be compelled to pay the debt twice.

Same: PROPERTY SUBJECT TO GARNISHMENT. In the instant case the
 2 garnishee bank was not liable as such because holding a note of the
 judgment debtor as purchaser and indorsee; as the judgment
 debtor was primarily liable on the note and would have no right
 in it until he paid it, and the judgment creditors' rights were only
 those of the judgment debtor.

Same: LIABILITY OF GARNISHEE. A garnishee is not liable for 'indebt-
 3 edness due the judgment debtor, where a note evidencing the
 indebtedness had been transferred by the judgment debtor to

another as collateral security; as the garnishee would not be owing anything until the note was transferred back to him.

Same. Where a bank as garnishee held collateral of the judgment
4 debtor to secure an indebtedness, the plaintiff was entitled only to a contingent judgment against the bank, either giving the right to the collaterals after paying the bank's claim, or providing that the bank should collect the collaterals and, after deducting its own claim, pay the balance to the plaintiff.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

TUESDAY, MARCH 17, 1914.

THIS is a garnishment proceeding, which resulted in a judgment discharging the garnishees, and plaintiff appeals.
—*Reversed and Remanded.*

Henry & Henry, for appellant.

Brown & Brammer, for appellees.

No appearance for Davis, defendant and appellee.

DEEMER, J.—Plaintiff held a judgment against Ira D. Davis, and on November 25th he sued out an execution on the judgment, and caused the Central State Bank and the Darlings, husband and wife, to be garnished as debtors to or as holders of property of the said Davis, subject to execution. The bank and the other garnishees filed answers, and upon the issues tendered thereby the case was tried to the court, resulting in a judgment practically discharging all the garnishees, and the plaintiff appeals.

The trial court made a finding of facts, from which we extract the following:

That at the time said garnishment was served upon said bank the defendant Ira D. Davis was indebted to said Central

State Bank in the sum of \$4,224.66, with interest thereon at the rate of 8 per cent. per annum from April 8, 1912, upon his one certain promissory note in said sum, bearing date April 8, 1912, due ninety days thereafter, payable to said bank. Said note of \$4,224.66 being a renewal of three prior notes of defendant Davis held by said bank, to wit: One note of \$3,500, dated August 9, 1911, one note of \$500, of date November 2, 1911, and one note of \$200, of date February 8, 1912, and interest on said notes.

That the said defendant Ira D. Davis was also indebted to the said bank in the sum of \$561, with interest at the rate of 8 per cent. per annum from October 17, 1912, on one certain promissory note in writing signed by the said Ira D. Davis and Anna E. Davis, his wife, dated October 17, 1912, due in 90 days thereafter, payable to one O. P. Herrold, and by him indorsed in blank and transferred to said bank October 22, 1912.

That said bank, on August 9, 1911, at the time it loaned said Davis said sum of \$3,500, received from defendant Davis as a part of the same transaction the following described collateral, which it continued to hold as collateral for said renewal note of \$4,224.66, to wit:

(a) Note of \$4,510.63, signed by the said Victoria C. Darling and Loren M. Darling, bearing date May 8, 1911, due December 8, 1911, with interest at 8 per cent. from date, payable to the order of said Ira D. Davis, and by him indorsed in blank, and delivered to said bank. That said note was secured by a real estate mortgage upon certain premises in the city of Des Moines, Iowa, described in the answer of Central State Bank, garnishee, which said premises are the homestead of garnishees Darling; said note and mortgage having been given for part of the purchase of said property.

(b) Also said bank held as additional collateral security to the payment of said note of Ira D. Davis of \$4,224.66, and of said prior notes two 5 per cent. bonds of the Iowa Loan & Trust Company for \$500 each, and one 5 per cent. bond for \$1,000 issued by said company, registered in the name of said Ira D. Davis, and all due April 1, 1913. That there was \$25 interest due on each said \$500 bonds, and \$50 interest due on said \$1,000 bond, on April 1, 1913, and that no part of the principal or said interest have been paid.

That said note of the said defendant Ira D. Davis pay-

able to said bank, for \$4,224.66 is a collateral note, and contains the following stipulation: 'Having deposited herewith a collateral security note and mortgage Victoria C. Darling, \$4,510.63, dated May 3, 1911, and debentures of Ia. Loan & Tr. Co. \$2,000.00 and tax certificates, with authority to sell the same, or any collaterals substituted for or added to the above, without notice, either at public or private sale, or otherwise, at option of the said Central State Bank, on the nonperformance of this promise, said bank applying net proceeds to the payment of this note, and accounting for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals, upon this note shall be applicable to any other note or claim against ——— held by said bank. In case of depreciation in the market of any security pledged for this loan, I hereby agree to deposit on demand a further amount of collaterals, so that the market value shall always be at least ten per cent. more than the amount of this note; and, failing to deposit such additional security, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the holder or holders may immediately reimburse themselves by the sale of the security.'

And that the said bonds, aggregating \$2,000, and said Darling note and mortgage, at the time the said garnishment was served on said bank, were properly held by said bank as collateral security, not only for the payment of said note of \$4,224.66 of defendant Davis, but also for the payment of said note of \$561 of the said defendant Davis, and his said wife, payable to said O. P. Herrold, and transferred to said bank on October 22, 1912.

The court further finds that at the time said bank was served with garnishment no part of said note of \$4,224.66 or of said note of \$561 of the defendant Davis, either of principal or interest, had been paid, and that no part of said Darling note of \$4,510.63 had been paid so far as appeared by any written indorsement on the back of said note, or so far as said bank had knowledge.

The court further finds that, notwithstanding no indorsements of payment were made upon said Darling note by the said defendant Davis, that nevertheless the said Victoria C. Darling and Loren M. Darling made payments upon said note in the aggregate sum of \$930, which said payments were made

to the said Davis, and not to said bank, and are as follows: Year 1911: May 3d, \$450; June 2d, \$50; July 20th, \$15; August 2d, \$25; November 11th, \$175. Year 1912: January 9th, \$20; April 13th, \$75; April 22d, \$25; June 20th, \$50; July 20th, \$15; August 10th, \$10; November 29th, \$20.

The court further finds that, as against the plaintiff, the defendant, the intervener, the garnishees Darling, and all parties hereto, the said Central State Bank, at the time of said garnishment, to wit, November 25, 1912, had a first and paramount lien upon said bonds aggregating \$2,000, and upon said Darling note of \$4,510.63, and mortgage securing the same for the payment of both said notes of defendant Davis, one for \$4,224.66, and the other for \$561.

The court further finds that, since said garnishment was made on said bank, the garnishees Darling made payments on their said note as follows: \$1,000 February 24, 1913, and \$175 March 28, 1913—and that said payments are indorsed upon said Darling note, and also indorsed upon said Davis note of \$4,510.63, as proper credits, thereby reducing the indebtedness of said Darlings to said bank to the sum of \$1,175.

The court further finds that there is now due and owing the Central State Bank from Ira D. Davis the sum of \$3,365 on his said note of \$4,224.66, and the further sum of \$584.31 on his said note of \$561, and that there is due on both said notes to said bank on this date the total sum of principal and interest of \$3,949.91.

The court further finds that said bonds aggregating \$2,000 of the Iowa Loan & Trust Company are worth their full face and interest, and that, even if the garnishees Darling be allowed their said credits aggregating \$930 on their said note, which was made to defendant Davis, instead of to said bank, that still the said bank will have sufficient security to discharge the full sum due from said Davis of his said two notes to said bank, and that therefore, as against the intervener King, and as against the plaintiff, and as against said bank, said credits should be allowed and indorsed upon said note, and that the plaintiff could not by said garnishment process secure any greater rights in respect of said Darling note than were held by the defendant Davis.

On these findings the following judgment was rendered:

It is therefore ordered, adjudged, considered, and decreed that the garnishees Darling are hereby allowed credits

upon their said note aggregating \$930 as of the dates of payment hereinbefore set out, and the further sum of \$1,000 paid on said note as above stated on February 24, 1913, and \$175 paid on said note March 28, 1913, and that upon payment of the balance due on said note of said garnishees, to wit, \$2,983.74, with interest thereon at the rate of 8 per cent. per annum from this date, that the said bank shall surrender to said garnishees Darling their said notes and mortgage on their said homestead, and cancel said mortgage of record, and that said bank shall apply the proceeds of said Darling note to the discharge of said two notes of defendant Davis, and that upon payment of their said note by said garnishees Darling they shall be and are, without any further order of this court, discharged as garnishees, and said bank be, and it is, discharged as garnishee in respect of said Darling note, without any further order of this court, to all of which the plaintiff and the intervener King at the time duly excepted.

The exception of the plaintiff only extends to the following matters:

First. To the conclusion that the garnishees Darling are entitled to a surrender and satisfaction of their note and mortgage upon payment of \$2,983.74, instead of \$3,949.91; the difference being the amount paid by Darling to the defendant Davis, with interest.

Second. To the failure to hold that the bank shall account to the plaintiff for such portion of the \$2,983.74, found due it, as represents the \$561 note and interest, being the sum of \$584.31, or shall deliver up said note to plaintiff for collection against O. P. Herrold, the indorser thereof.

The court directs that no satisfaction of the Darling note and mortgage be made by the bank until after five days from the entry of this order, during which time the plaintiff may perfect its appeal from this order by giving notice as required by law, and by filing a supersedeas bond in the sum of \$1,000.

These excerpts from the record show the real questions involved. They relate to the \$930 payment made by the

Darlings to Davis after the transfer of the notes as collateral to the bank, and to the \$561 note executed by Davis and wife to Herrold, and by him (Herrold) indorsed to the bank. Neither the liability of the bank nor of the Darlings, as garnishees, to plaintiff is any greater than the liability they would be under were Davis calling upon them to respond under the same state of facts. This is fundamental law, supported by the following, among other, cases; *Streeter v. Gleason*, 120 Iowa, 703; *Steltzer v. Condon*, 139 Iowa, 754; *Packer v. Crary*, 121 Iowa, 388; *Smith v. Clarke*, 9 Iowa, 241; *Smith Lumber Co. v. Garbage Co.*, 149 Iowa, 272. And a garnishee will not, in the absence of some fault on his part, be put in such position as to be compelled to pay the debt twice. *Walters v. Insurance Co.*, 1 Iowa, 404; *Williams v. Housel*, 2 Iowa, 154; *Burton v. Dist. Twp.*, 11 Iowa, 166; *Smith Co. v. Garbage Co.*, 149 Iowa, 272.

As to the \$561 note: This was made by Davis and wife to Herrold, and sold and indorsed by the latter to the bank; the bank paying therefor the sum of \$561. Whether the purchase price was paid to Herrold, the indorser, or to Davis does not appear. Herrold's liability on the note is simply that of an indorser, and it is not a primary one. The bank claims to hold all the collaterals it theretofore received from Davis as collateral to this note pursuant to the stipulation quoted in the main note. Whether that be true or not (and, of its right to hold the prior collaterals as security for the note, there is some doubt), the bank advanced the purchase price of the note to either Herrold or Davis, and until this is returned neither is entitled to the note, or to any relief against the bank. The bank purchased the paper, and until it is reimbursed Davis has no claim to the note, and as it is his primary obligation, he cannot insist that the indorser is the principal debtor, and have a return of either the note or of the amount thereof, until he pays his debt, so that in the long run it is entirely immaterial whether the bank has any claim to it as collateral security or not. If it insists

1. GARNISHMENT:
liability of
garnishee.

2. SAME: property
subject to gar-
nishment.

on any such claim, then it is entitled to charge to the Davis account the amount paid by it for the note, so that, no matter which theory be adopted, the bank cannot be held as garnishee because of any indebtedness to Davis, or of holding any property of his because of the purchase of the \$561 note.

II. As to the \$930 payment made by the Darlings to Davis: Davis was indebted to the bank at and before the garnishments were run in the sum of \$4,224.66, with interest at 8 per cent thereon from April 8, 1912, saying nothing now of the indebtedness on the \$561 note. It held as collateral security for this some debenture bonds of the Iowa Loan & Trust Company, amounting to the sum of \$2,000, not counting interest, and a note signed by Victoria C. Darling and husband for \$4,510.63, bearing date May 3, 1911, with interest at 8 per cent from date, payable to Ira D. Davis, and by him indorsed to the bank before maturity, which note was secured by a real estate mortgage on the homestead of the Darlings.

After the indorsement of the note to the bank, and before the garnishment was run, the Darlings paid to Davis the sum of \$910 upon their note; but the amount of these payments was not indorsed upon the note, because it was held by the bank as collateral security; and after the garnishment, and before trial, they paid to him (Davis) the sum of \$1,185, all but \$20 of which was indorsed upon their note, and also credited upon the Davis note to the bank.

One King intervened in the case, and claimed that he owned the two debenture bonds. The disposition made of this intervening petition will appear from the decree already quoted.

When the Darlings were advised of the indorsement of their notes as collateral to the bank does not appear. They made their payments to the payee of the note in order to clear their homestead of its incumbrance, and have no claim against Davis, unless it be because of their negligence in paying the wrong party, and by reason thereof are forced to pay

it again to the bank. In that event they might have a claim against Davis because of having to pay it twice. As the matter now stands, they could not, at the time of the garnishment, or since, have enforced any claim against Davis on account of the payment of their obligations.

The bank was entitled to hold all its collaterals until the Davis note was paid, and in no event would Davis be entitled to anything until his obligations to the bank were paid and satisfied. In that event, if any collaterals which he had deposited remained in the hands of the bank, he (Davis) was entitled to the return thereof, and by the garnishment process plaintiff would have the same right.

Because of the fact that the court did not dispose of the King intervention, we have some difficulty in disposing of the case, for the record does not contain any of the testimony relating to the issue tendered by this petition of intervention. It is quite clear, upon the record as it stands, that the Darlings should not be held, save it be on the theory of a contingent liability because they paid their notes to the wrong party.

As to the bank: Davis owed the bank at the time of the garnishment approximately \$4,431.20. The bank held as collateral at that time debenture bonds amounting, with interest, to approximately \$2,000, no interest to speak of being due at that time, and the notes of the Darlings, of \$4,510.63, upon which payments amounting to \$540 had been paid to Davis before the transfer thereof, leaving a balance due, including interest, of approximately \$4,466.51. After the transfer, and before the garnishment, \$370 was paid by the Darlings to Davis, which was not credited upon the notes. And after the garnishment, \$20 was paid to Davis, which was not credited, and the further sum of \$1,175 was paid by the Darlings, which was indorsed, not only upon their notes, but also upon the Davis notes. At the date of the garnishment the debt due the bank from Davis, not counting the \$561 note, was \$4,431.20, and the amount of the collaterals held by it, consisting of the

Darling note and the debenture bonds, was \$6,466.51. If the payments made by the Darlings after the indorsement of the note to the bank, and before garnishment, be deducted, although not credited upon the notes, this would reduce the collaterals by the sum of \$370, leaving a balance of \$6,096.51. And if the payment made after garnishment, not credited on the note, be also subtracted, it will leave the sum of \$6,076.51.

The payments made by the Darlings during the year 1913 of \$1,175 were indorsed upon Davis' note, reducing the amount due thereon, not counting interest, to \$3,256.20; but the collaterals were also reduced by the same amount, or to the sum of approximately \$4,901.51, or \$4,921.51, depending upon whether the credit of \$20 paid November 29, 1912, be allowed. So that the net amount of the collaterals held by the bank, including the debentures, would be in the one case \$4,921.51, or in the other \$4,901.51, and the approximate amount of the indebtedness of Davis which these collaterals were made to secure would be \$3,256.20; the excess being in the one case \$1,665.31, and in the other \$1,645.31. Until it is definitely determined whether the debenture bonds belonged to King, the intervener, or were properly held by the bank as collateral, there is no way whereby to determine the contingent liability of the bank because of its holding collaterals belonging to Davis as security for an obligation from him to the bank. In this connection we eliminate entirely the \$561 note. That was purchased from the payee, Herrold, and the bank paid Herrold for it. Davis did not deposit it as collateral, for it was his own note, and should not be taken into account in this transaction. If it be considered at all, the bank should be credited with the amount it paid for the note, and the amount charged to Davis' account, and charged with the face of the note as if collected; and, as one offsets the other, it is clear that this note should be eliminated for present purposes. The stipulation in the Davis note, given to the bank, from which we have quoted, evidently does not include Davis' own note to a third party, from whom the bank

purchased the note, and, if it did, the bank should charge as against it the amount it paid for the note.

With these facts in mind, it is difficult to understand the order made by the trial court.

As to the Darlings: They paid on their note to Davis \$1,175, which was credited both on their note and on the Davis note. They paid to Davis, before the indorsement of the note by Davis to the bank as collateral, the sum of \$540, and after the indorsement they paid Davis, before the garnishment, \$370, and after the garnishment, \$20, none of which items were credited upon their notes. They also paid, after the garnishment, the sum of \$1,175, which was credited both on their notes and upon the Davis note, held by the bank. Under this theory they would not be owing Davis anything at any time until the notes were transferred back to Davis by the bank, and their liability to the judgment plaintiff would in no case be greater than their liability to Davis. As against him they would be entitled to all amounts paid him, even were the notes then held by another as collateral security. If they were sued by the bank, their liability might have been greater than to Davis because of their payment of part of the amount to the wrong party. *Steltzer v. Condon*, 139 Iowa, 754; *Smith Co. v. Garbage Co.*, 149 Iowa, 272. If they were made to pay their notes, or any part thereof, twice by reason of these payments, Davis would then be owing them, instead of their owing Davis.

As to the bank: It has and had a claim against Davis, and also held some of his property as collateral security for the amount of this indebtedness. When Davis paid his obligation

4. SAME. to the bank, he was entitled to the return of his securities, and in such event the bank would be holding his property, and would be liable therefor to him. If it made its claim out of part of these securities, the remainder would have to be returned to Davis, for it was his property. At the time of the garnishment neither event had transpired; but the bank was holding Davis' property as

security for its indebtedness. Whether this property so held amounted to more than this indebtedness could not accurately be told until the amount of the collaterals was ascertained in some manner, and the amount of Davis' indebtedness to them fixed.

The first step, then, was to determine whether these debenture bonds belonged to the intervener or were properly held by the bank as collateral security for Davis' account. This finding was never made by the trial court, and we have no record from which to determine that question. If they belonged to King, and the bank had no right thereto as collateral from Davis, then, according to the figures we have made, the bank does not hold more of Davis' property as collateral security than it is entitled to. If, on the other hand, it be found that the bank rightly holds the debenture bonds, its collaterals largely exceed Davis' indebtedness, and to the amount thereof the judgment debtor should have a contingent judgment against the bank, either giving it the right to the collaterals after paying the amount of the bank's claim, or providing that the bank should collect the amount due on the collaterals, and, after extinguishing its own debt, pay the remainder over to the judgment plaintiff.

As the case must, in any event, be retried, we may here indicate our views as to the method of computation. All payments made by the Darlings to Davis before the assignment of the note as collateral, amounting to, under this record, \$540, and all payments made by the Darlings to Davis after the garnishment, which were credited on both the Darling and the Davis notes, amounting to \$1,175, should be allowed to the bank absolutely. As to the other payments made by the Darlings to Davis after the indorsement of their note to the bank, and after the garnishment, for which no credit has been given to Davis on his obligation to the bank, amounting in the aggregate to \$390, this is nothing more than a chose in action held by the bank against the Darlings, for which the bank would not be liable to Davis, because Davis got all except \$20

before the garnishment, and, in the absence of some proof of fraud or collusion or unfair dealing, the bank would not be liable as garnishee because, save as to the one item, the amounts were all paid by the Darlings to Davis before the garnishment was run. It is not enough that the garnishee might have collected these amounts from Davis, or from the Darlings, by reason of being a holder of the note in due course, and before maturity. It is a question of its liability to Davis, and as garnishee it cannot ordinarily be held to a greater liability than it was under to the judgment debtor. If the record showed any fraud or collusion between the parties, the case might be different. As there is no such proof in this case, we need not further elaborate the point.

Neither the Darlings nor the bank should have been absolutely discharged. Their liability, whether absolute or conditional, can only be determined after a further hearing. The Darlings are indebted to either Davis or the bank upon the note they gave Davis, and primarily their liability is to Davis for the amount due on their notes, after giving them credit with all amounts paid by them to Davis, unless fraud, conspiracy, or collusion be shown under proper issues.

The bank holds property belonging to Davis, either the Darling notes and mortgage, or the debenture bonds, or both, but as security for Davis' indebtedness to it. When this indebtedness is paid, Davis is entitled to the return of his collaterals; but he is not entitled to any credit on his notes to the bank for the amount he collected from the Darlings after his assignment thereof to the bank, unless there be proof of fraud or collusion, and an intent to defraud the creditors of Davis, nor should the bank be charged with the amounts paid by the Darlings to Davis, in the absence of such proof. In other words, the judgment finally rendered should protect the bank to the amount of its indebtedness against Davis, and it should be held to account for the securities it received from Davis, and to which, but for the garnishment, he would have been entitled. As he (Davis) received the

money from the Darlings without any fraud or collusion between him and the bank, so far as shown, he would not be entitled to recover from the bank in an action brought by him for money which he himself collected from the Darlings, and failed or refused to turn over to the bank.

The Herrold note is, as we think, entirely out of the case. There never was any authority from anybody to pay that note out of either the debentures or the Darling note. It was an entirely independent transaction, and the bank purchased it from either Herrold or Davis, and paid its money therefor. The matter of the collaterals for other obligations of Davis was not mentioned, and the bank purchased upon the financial ability of the indorser, Herrold. We have said enough to indicate our views, and it follows that the case must be reversed and remanded for a retrial and a judgment in harmony with this opinion.—*Reversed and Remanded.*

LADD, C. J. and GAYNOR and WITHROW, JJ., concurring.

O. P. HERRICK, Appellant, v. WATSON P. DAVIDSON, et al., Appellees.

Receivers: COMPENSATION: DISCRETION. The compensation to be allowed a receiver appointed by the court is largely a matter of discretion, and the allowance will not be disturbed on appeal unless an abuse of such discretion is shown. In the instant case an allowance of \$50.00 per month is approved; it appearing that the receiver was to slight actual expense and gave the business but little personal attention.

Appeal from Polk District Court.—HON. CHAS. S. BRADSHAW, Judge.

TUESDAY, MARCH 17, 1914.

APPEAL from an order fixing the compensation to a receiver appointed by the district court of Polk county.—*Affirmed.*

Patton, Nesbitt & Ralls, for appellant.

No appearance for appellee.

DEEMER, J.—In proceeding to foreclose a mortgage upon what is known as the Observatory block in the city of Des Moines, plaintiff, O. P. Herrick, was appointed a receiver to take charge of the property. Herrick, prior to his appointment, was a second mortgagee of the property, but he afterward made an assignment of his mortgage to Watson P. Davidson. He served as receiver for several months, and handled approximately \$15,000. When he filed his final report he showed that he had a balance on hand in the sum of \$1,347.72, but by supplemental report showed that his balance was \$1,583.80, and he asked an allowance for his attorneys, which was granted, and the sum of \$150 per month as compensation for his services. His claim for compensation was resisted by the creditors and owners of the property on various grounds, and the trial court after hearing the evidence, allowed him the sum of \$50 per month to cover office expenses, postage, etc., amounting in the aggregate to \$458.33, and the balance in his hands was ordered turned over to his successor. The receiver appeals.

Herrick commenced the foreclosure suit and asked for the appointment of a receiver to care for the property pending the suit on his second mortgage. Prior to his appointment as receiver, he entered into a stipulation with the holders of the first mortgage, from which we extract the following: "It is further agreed that whether O. P. Herrick or C. G. Van Vliet are receivers for said property under order of the district court

of Polk county, Iowa, neither shall receive compensation, allowances for clerk hire nor for attorney's fees, if the title to the said property is acquired pursuant to the terms hereof by said plaintiff or said cross-petitioner." After the entry of the decree in the main case, Herrick assigned his claim to W. P. Davidson. The decree appointing the receiver is not set out in the abstract, but he made a final report on November 18, 1912, tendering his resignation, and asked a discharge. Davidson and the Observatory Realty Company filed objections to the report, in which they claimed the receiver was improperly appointed without any notice being given them of the application, and for various other reasons. They also insisted that he was not entitled to any compensation because he was plaintiff, and could not be a receiver, and for the further reason that he had used various rooms in the building for his office, and had never paid any rent therefor, and that he had managed the property through agents and servants who had been fully compensated for their work.

Testimony was adduced by plaintiff tending to show the value of the receiver's services, and from this testimony we learn that the receiver occupied two large rooms in the building, for which he paid no rent; that he had a lady clerk who looked after the collection of the rents, who was paid \$12 per week out of the funds coming into his hands; that he had an elevatorman who looked after the elevator and an engineer who looked after the machinery in the building whose compensation was paid out of the funds; and that altogether he employed eight men about the building. He paid out something in postage and for clerk hire, but the amounts are not shown. Herrick was a large contractor, engaged in drainage work, and during his receivership had contracts in at least six states, which required his attention. He admits that because of these contracts he was away from home an average of five days in each month, and that he gave attention to these matters while at home. Indeed the extent of his personal services in connection with the rental of the building, or in looking after

it, is not shown save by the barest inferences. He did not keep his postage and other accounts as receiver separate from his personal items and we have no data as to the amount of these expenses. The showing on his part as to actual work done and expenses incurred is not satisfactory, and, taking into account the help he had, the fact that what he did did not interfere with his other business, and that during all the time he had his office rooms in the building, rent free, we do not think we are justified in disturbing the allowance made by the trial court. The amount of compensation to be allowed a receiver appointed by the court is largely a matter of discretion, and we are not justified in interfering unless it affirmatively appears that such discretion has been abused. *Stearns Paint Co. v. Comstock*, 121 Iowa, 430.

The trial court was not bound to take any one's opinion as to the value of the services; and, as the record is not such as to convince us of any abuse of discretion, the allowance made by the trial court must be sustained, and the order will be, and it is—*Affirmed*.

LADD, C. J., and GAYNOR and PRESTON, JJ., concurring.

HARRY I. STELTZER, Appellee, v. MARY H. COMPTON, Appellee,
CLATE KERLIN, LIZZIE KERLIN and WALTER T. FITZGERALD,
Appellants.

Actions: INTERVENTION. To entitle a party to intervene in an action between others he must have an interest in the subject of litigation, and must either join the plaintiff in claiming what is sought by the petition, or unite with the defendant in resisting the claim of plaintiff, or present a demand adverse to both plaintiff and defendant. He cannot come into the action upon an independent right of action which will be in no way affected by the outcome of the original controversy. Thus the makers of usurious notes cannot intervene and assert usury, in an action for specific performance of a contract providing that defendant should accept such

notes as part of the consideration, which action was defended on the ground that the notes were usurious.

Appeal from Dallas District Court.—HON. J. H. APPLEGATE,
Judge.

TUESDAY, MARCH 17, 1914.

ACTION for specific performance. Petition of intervention filed. Petition of intervention dismissed, on the ground that the matters therein set out are not germane to any controversy between the plaintiff and the defendant. Interveners appeal.—*Affirmed.*

Ryan & Ryan, for appellants.

F. G. Ryan and *Harry Wifvat*, for appellee, Mary H. Compton.

H. S. Dugan, for appellee, Harry I. Steltzer.

GAYNOR, J.—The plaintiff brought his action against the defendant for a specific performance of a certain written contract in which the defendant agreed to convey to plaintiff certain real estate for the sum of \$22,400, in consideration for which the defendant, among other things, agreed to accept a certain promissory note, payable to the plaintiff and signed by the interveners, Walter T. Fitzgerald, Margaret Fitzgerald, Lizzie Kerlin, and Clate Kerlin. The defendant, among other things, alleged, as a defense to plaintiff's right to a specific performance, that she relied upon the fact that the note aforesaid, which by her contract she agreed to accept as part consideration for her conveyance, was a valid obligation and enforceable against the makers of the note; that she was, subsequently, informed that the note, so to be delivered to her, was tainted with usury, and was therefore not enforceable against the makers of the note, and would be subject to such

defenses in her hands if she took it, that the note was not what it purported to be on its face, and that she was deceived into signing the contract and entering into the agreement to convey; and alleged that, by reason of the fact aforesaid, and other facts alleged, she was not, in equity, bound to a performance of said contract; that plaintiff was therefore not entitled to the specific performance of it, and asked that plaintiff's petition be dismissed. Thereupon these interveners filed their petition of intervention, in which they allege that the promissory note, referred to in defendant's answer, made by them, and which the plaintiff is seeking in the action to compel the defendant to take in part payment for her land, was given entirely for usurious interest, and that interveners are therefore interested in the controversy in so far as said note is involved, and that they have an interest in preventing the passing of said note, tainted with usury, into the hands of the defendant; that, if this were permitted, they might be deprived of their defense to said note, and they ask that they be permitted to present their defense to said note, that justice may be administered between interveners and the plaintiff, and they pray that an accounting be had between the interveners and the plaintiff, and that said note be decreed null and void, and that the same be fully discharged.

To this petition of interveners plaintiff demurred. Thereupon the cause proceeded to trial upon the issues tendered between the plaintiff, the defendant, and the interveners. After the evidence had proceeded at some length, a motion to dismiss petition of intervention was made, which, among other things, stated: "The claims of the interveners, as set forth in their petition, are not germane to the issues in this case between the plaintiff and the defendant, in that they have failed to show that they have any right that will be prejudiced by any adjudication between the plaintiff and the defendant; that they are attempting to inject new matters in the main suit, and extend the scope of litigation beyond the controversy between the plaintiff and the defendant." Thereupon

the court made the following ruling: "And now on this 3d day of April, 1913, the trial of this case being in progress and the witnesses Walter T. Fitzgerald and Clate Kerlin having been examined on behalf of the defendant and said interveners, plaintiff presents his demurrer to the petition of interveners, for a ruling thereon, and said demurrer, having been duly considered by the court, is overruled, to which ruling at the time plaintiff duly excepts. Thereupon, plaintiff presents for the consideration of the court his motion to dismiss the petition of intervention, which motion was filed this day; the court upon due consideration thereof, sustains said motion and dismisses said petition of intervention, and taxes the costs, made by said intervention, to the interveners. It is therefore ordered and adjudged that the petition of interveners be, and it is hereby, dismissed, at the costs of interveners, taxed at \$19.40, for which sum of \$19.40 it is ordered, adjudged, and decreed plaintiff have and recover judgment against the interveners, Clate Kerlin, Lizzie Kerlin, and Walter T. Fitzgerald; to each of which orders and to said judgment said interveners at the time duly except." After this ruling dismissing interveners' petition, the cause proceeded to trial upon the issues between the plaintiff and the defendant, and thereafter the court entered a decree in favor of the defendant dismissing plaintiff's petition, and the controversy between plaintiff and defendant was at an end. From the order dismissing interveners' petition, interveners have appealed to this court.

The plaintiffs claim the right to intervene under section 3594 of the Code of 1897, which reads as follows: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely, to both the

plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences.”

In this case, the plaintiff sought a specific performance of a written contract made between him and the defendant. He sought, by the action, to compel the defendant to convey to him certain lands, and to take from him in payment therefor, as provided in the contract, a note executed by these interveners. The defendant denied his right to a specific performance, and based this denial, among other things, upon the fact, as alleged by her, that the note executed by these interveners, and which the plaintiff sought to compel her to take, was tainted with usury, and therefore the court ought not to decree a specific performance of the contract. As between the plaintiff and the defendant, so far as this issue is concerned, the only question for the court to determine is whether or not a decree of specific performance ought to be entered against the defendant. Upon this issue tendered, the plaintiff's right to a decree depended upon whether or not the note in question was tainted with usury, and whether or not the plaintiff fraudulently concealed this fact from the defendant to induce her to enter into the contract. If the fact were found, as alleged by the defendant, the court undoubtedly would refuse, as it did refuse, a specific performance of the contract.

A petition of intervention, under this statute, to be permissible, the intervener in the petition must join the plaintiff in claiming what is sought by him in his petition, or must show a right to unite, an interest in uniting, and must unite with the defendant in resisting plaintiff's claim.

In the case at bar, interveners did not unite with the plaintiff in asking any relief against the defendant, nor did they join with the defendant; nor did they have an interest in joining with the defendant in resisting plaintiff's claim for a specific performance, nor did they demand anything adversely to both the plaintiff and the defendant. They presented, and sought to enforce, an independent right on the part of these interveners, against the plaintiff—a right to pro-

tect which it was not necessary for them to join in this suit or secure the relief for which they prayed.

Before this petition of intervention was filed, the defendant was advised of the usurious character of the note and made her defense on that ground. The intervention added nothing to her defense. Nor did the dismissal of the petition take away from these interveners, or adjudicate any right which they sought to have investigated in this case. They were clearly interlopers in a proceeding and suit in which the success or failure of either party would in no way affect their rights, and they did not ask relief or demand anything adversely to both of these parties litigant. As said in *Des Moines Ins. Co. v. Lent*, 75 Iowa, 522, 525: "One who attempts to intervene in an action pending between other parties, without bringing himself within the provisions of the statute, is a mere interloper, who acquires no rights by his unauthorized interference."

In the case at bar, the success of the plaintiff would not have defeated any right that the interveners had, or attempted to assert, in this suit. The success or failure of the defendant in that suit would not affect any right they had or attempted to assert. The relief they sought was independent of any controversy between these parties, and independent of any relief which could possibly be granted to either of the parties in the suit as originally brought. But, however this may be, the cause between the plaintiff and the defendant is terminated by a judgment of the court in favor of the defendant, dismissing plaintiff's petition.

There is no action pending now between these parties, and a reversal of this cause would not add to interveners' right to proceed against the holder of this note for a cancellation, on the grounds averred in their petition of intervention.

The issue, sought to be tendered by the petition of intervention, was not fully tried and disposed of on its merits in the court below. The case was disposed of there on purely technical grounds. No decree upon the merits of the con-

troverſy was entered in the diſtrict court. It is not triable *de novo* here for that reaſon. The moſt that could be done, if we found error in the ruling of the court, would be to reverse the cauſe and ſend it back for trial upon its merits. We do not think any good purpoſe would be ſerved by this, even if we found error in the court's action. We find no reversible error, and the cauſe is—*Affirmed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

MARY C. HAULMAN, Appellant, v. H. E. HAULMAN and B. T. HAULMAN, Executors, Appellees.

Trusts: POWER TO CREATE: CHARACTER OF INSTRUMENT. The legal
1 title to any property may be conveyed to a trustee to be held for the benefit of others; but where enjoyment is deferred until after the death of the grantor the legal title remains in him until his death and the instrument is to be treated as testamentary in character. Where, however, the conveyance transfers the title, dominion and control of the property to the trustee at the time of its execution, a postponement of the enjoyment to ſome future time will not make the instrument testamentary in character.

Same: POWER OF DISPOSITION: RIGHTS OF BENEFICIARY: REVOCATION
2 **OF TRUST.** Any competent perſon has a legal right to transfer any kind of property to a trustee for the uſe of a designated beneficiary, with or without conſideration, and the beneficiary acquires an immediate and veſted intereſt ſubject only to the rights of creditors; and ſuch a diſpoſition when conſummated is binding upon the donor and all perſons claiming under him, and cannot be revoked unleſs the power of revocation has been expreſſly reſerved.

Same: WILLS: GIFTS: DISTINCTION. The donor placed certain money
3 in truſt for his children with provision that other ſums might be added to the fund, and provided that he ſhould receive intereſt on the fund, if he ſo deſired, with final diſtribution five years after his death. The donor gave directions as to the management of the fund but reſerved no control over the ſame. It was alſo provided that each child might receive a loan from the fund or in caſe of neceſſity might have his ſhare of the fund. The iſſue of deceased

children were to have the share of their parents, and the survivors the share of any child dying without issue. *Held*, that the instrument conveyed a present interest and was not testamentary in character, so that the wife of the donor who was married to him after the execution of the trust was not entitled to anything out of the fund. It is also held that the instrument did not create a gift *inter vivos*.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

TUESDAY, MARCH 17, 1914.

ACTION to construe a trust instrument. Plaintiff contends that the instrument was testamentary in its character, and, not being executed or witnessed, as required by law, it could not be enforced, even as such; that the defendants named as trustees in the instrument, took no title to the property in controversy, and had no right to the property in controversy, under the instrument in question; that, the instrument being ineffectual as a trust deed, the property passed to the estate of the trustor, and was therefore wrongfully retained by defendants. Decree for defendants dismissing plaintiff's petition.—*Affirmed*.

Ryan & Ryan, for appellant.

E. P. Hudson, for appellees.

GAYNOR, J.—The plaintiff is the widow of one Harry Haulman. The defendants are the executors of his will. This action is brought by the plaintiff to have the defendants removed as executors of the will, on the ground that they have in their possession a certain sum of money received by them from Harry Haulman before his death, under some sort of an arrangement between them, by which they were to pay to the deceased interest upon the money held by them, and that they have failed to account for the same as any portion of the

estate; that they filed an inventory of the personal property of the said Harry Haulman, and therein made no mention of the money so received and held by them.

The defendants filed an answer to plaintiff's petition, alleging that the money so held by them was no part of the estate of Harry Haulman, alleging that on or about the 5th of December, 1907, said Harry Haulman executed and delivered to them an instrument, in writing, in the following words and figures, and that the money referred to in said instrument is the same money of which the plaintiff complains:

These presents witness that I, Harry Haulman, a resident of Ankeny, in the county of Polk and state of Iowa, do by these presents create a trust of my entire property, and do place the same therein subject to the following conditions and limitations, to wit:

On the 1st day of November, A. D. 1907, I will place in the hands of my two sons, H. E. Haulman and B. T. Haulman, the sum of twenty-five hundred dollars (\$2,500.00), whom I do hereby create the trustees of said fund, and also of any and all other sums that may be added to said sum both before and after my decease.

Said sum of twenty-five hundred dollars (\$2,500.00) is hereby placed in trust with my said sons, H. E. Haulman and B. T. Haulman, for the use and benefit of my five children, to wit, H. E. Haulman, B. T. Haulman, Mrs. J. H. Harris, Mrs. W. H. Lewis, and Mrs. A. W. Wagner, each to share equally in the fund and benefits thereof as hereinafter provided.

Said sum of \$2,500.00 is to be invested in such securities as my said trustees shall both agree upon and deem wise and best by them, and they are to add to said fund all interest accumulations and profits accruing from said \$2,500.00 so invested, and to keep said fund, its accumulations and profits, continuously invested in such ways as they shall deem best.

My said trustees shall pay to me 4 per cent. interest on said original sum of \$2,500.00 on the 1st day of November in each year beginning with November 1, A. D. 1908. But, in case I do not need or desire my said trustees to pay me said interest, then the same shall be kept intact in said trust fund.

My said trustees shall not be required to pay interest on any accumulations or profits, but only on the original sum of \$2,500.00.

With the written consent of all of my said children who may be living at any particular time, my said trustees may loan any portion of said trust fund to any one of my said children on such terms and securities as to my said trustees shall seem wise and best.

In case, also, of real necessity, and upon the written consent of all of my said children who may be living at any particular time, my said trustees may permit any one of my said children to draw from said trust fund any amount which my said trustees shall think to be best, up to the amount of such child's undivided share in said fund, but no more. In case of the death of one or more of my said children, his children or living issue of his body shall have and receive his parent's share of said fund, and the benefits thereof, the same as my said child so deceased would have received his share of said fund, and the benefits and profits thereof.

In case any of my said children shall die leaving no children or living issue of his body, then, and in that event, the portion of said trust fund and its accumulations which would have gone to my said child shall remain in said trust fund, and shall be divided equally among my said other children, or their issue, the same as the balance of the fund shall be handled, and not otherwise.

Upon my death, all of my property, both real and personal, and wherever situated, shall pass into the hands of my said trustees to be handled by them as said \$2,500.00, and the whole of said property shall be kept intact by my said trustees in such form and condition as to them shall seem best for the full period of five years from the date of my decease, when, at that time, my said trustees shall make an equal distribution of said trust property, and of all of my property then remaining, to my said five children, or the living issue of their body, share and share alike. That is, each child shall receive a portion equal in all respects to that of any other of my said children. And if any of my said children be then dead, and have issue of their body then living, such issue shall receive the portion of said trust fund and property which would have gone to their parent had he or she been living.

In the case of the death of either or both of my said

trustees, the remaining children of mine herein mentioned shall choose a successor to such deceased trustee who shall carry on and perform the trust herein created. It being my desire and intent that no person outside of my own children as herein mentioned shall ever be a trustee of this trust. It being my desire, also, and intention that there shall at all times be two trustees of my said property.

Should I, at any time, add to this trust amount in my lifetime, my said trustees shall receive such amounts, and handle and care for such amounts, the same as is herein mentioned concerning said \$2,500.00 and its accumulations and other property.

It is my desire, and a condition that I require of my said trustees, that they keep a strict account of said trust fund, and of all additions thereto, and of all accumulations thereof, and that each year, in the month of November, they render a written statement to me, and to each of my said children, showing the actual condition of said fund, the amount thereof, and how invested, and the securities held by them. It is also my desire and intention that my said trustees shall serve without compensation other than that arising to all of my children equally.

Witness my hand this 5th day of December, A. D. 1907.

It appears that, at the same time that this instrument above set out was executed, the said Harry Haulman made his will:

I, Harry Haulman, being of lawful age and of sound mind and disposing memory do hereby make, publish and declare this to be my last will and testament, to wit: I do hereby will, bequeath and devise unto my five children, H. E. Haulman, B. T. Haulman, Mrs. J. H. Harris, Mrs. W. H. Lewis and Mrs. A. W. Wagner, all of my property both real and personal that I now have, or may hereafter accumulate or acquire, share and share alike. I do hereby nominate and appoint my two sons, H. E. Haulman and B. T. Haulman executors of this my last will and testament and request and direct that they keep and care for my property the same as I have this day directed them to do in an article of trust and that they follow out the provisions of said trust fully, and, at the end of five years from my decease that they make an equal distribution of my property to my said children. If any of my said children die without issue and in that event, his

share shall be equally divided among the remaining children, except that if any of my children are deceased and have living issue, then and in that event, they shall receive the share which their parent would have received if living.

I do hereby request that said trust be fully executed and that said trust instrument and this will be construed together and that my said property be handled and disposed of as in said trust instrument and in this will provided. Witness my hand this 5th day of December, A. D. 1907.

It appears that on the day said instruments were executed the said Harry Haulman gave and delivered into the hands of the trustees named in said deed (defendants herein), to be controlled as provided in said instrument, the sum therein named, being the amount involved in this controversy; that they handled the same under said trust deed, together with the accumulations, in accordance with the trust therein created, and had the same, with its accumulations, on hand at the time this proceeding was commenced.

It appears that the plaintiff herein and the said Harry Haulman were married on the 29th day of January, 1908, and that the said Harry Haulman died on the 11th day of November, 1912; that the will, hereinbefore set out, was duly probated; that the plaintiff elected to take her distributive share in the estate of the said Harry Haulman.

It appears that, after the defendants had filed their answer setting out the foregoing facts, the plaintiff filed the following motion, which was by the court overruled: "And now comes Mary C. Haulman, widow of Harry Haulman, deceased, and upon the 'answer of executors to petition of Mary C. Haulman for their removal,' and the admissions in said answer contained, moves this honorable court to order, adjudge, and decree that said Mary C. Haulman is entitled to a one-third interest in all the property of said Harry Haulman, including the \$2,500 in said answer mentioned, and that the said executors be required to amend their inventory filed herein so as to include said \$2,500 therein."

The removal of the executors, as prayed for, was denied; the court especially finding that the \$2,500, with its accumulations, mentioned in the trust deed, was no part of the estate of Harry Haulman, and that the plaintiff is not entitled to participate therein. From this order, the appeal was taken.

The appellant relies upon five points for reversal:

(1) There was no executed gift by virtue of the trust instrument, for an executed gift is inconsistent with the declaration of trust.

(2) A trust instrument vests in the trustees only such estate as is necessary to enable them to execute the trust.

(3) Equity will not interpose to perfect a defective gift or voluntary settlement.

(4) The instrument was not executed in compliance with the statute governing wills, and therefore is ineffective as a testamentary disposition of property. It is equally ineffective to evidence a gift *inter vivos*.

(5) The fact that in the will testator requires the trustees to "keep and care for my property the same as I have this day directed them to do in an article of trust and that they follow out the provisions of said trust fully, and, at the end of five years from my decease that they make an equal distribution of my property to my children," does not make the trust instrument a part of said will, and so give to said instrument vitality as a testamentary disposition of property.

A proper determination of the controversy here involves a construction of the instruments hereinbefore set out. The rights of these parties to the money in controversy must be determined from a consideration of these instruments alone.

There is no question but that any property, real or personal, may be transferred and conveyed by the owner to a trustee, to be held by the trustee for the use and benefit of others; that the owner of property may transfer the legal title to another, to be held, controlled, and managed by the other for the use and benefit of others designated by him.

1. TRUSTS: power to create; character of instrument.

It is true that, where the use and benefit and enjoyment of the thing conveyed is deferred until after the death of the owner, and where, by the terms of the instrument, the conveyance does not become effectual until after the death of the grantor, and the legal title remains in the grantor until such time, the instrument is, of necessity, testamentary in its character, and can be enforced only as such.

To make it effectual, the instrument of conveyance must operate *in praesenti*. It must transfer the title, dominion, and control over the thing to the trustee at the time of its execution and delivery, and when this is done, the enjoyment of the thing conveyed may be postponed until after the death of the grantor, or postponed to any future time. The benefits to be derived from the grant may be postponed, without the instrument losing any of its *efficiency* as a trust instrument, or without affecting, in the least, the trust character of the conveyance.

In all instruments of this kind, where a trust is created in one for the use and benefit of another the party creating the trust must release all power of disposition over the fund.

It is fundamental law that any person of lawful age and sound mind has a legal right to turn over personal property of whatever character into the hands of another, to be held

and used for the benefit of some person designated therein as beneficiary, and that, when this is done, whether by written instrument or parol, the beneficiary obtains an immediate and vested interest in the subject of the trust, and the party creating the trust cannot revoke or disaffirm the same, unless such power of revocation has been reserved, in express terms, at the time of the creation of the trust. The owner of personal property has the absolute right to dispose of it to whomsoever he sees fit, with or without consideration, and subject only to those limitations as to creditors, and such a disposition, when fully consummated, becomes binding upon

2. SAME: power of disposition: rights of beneficiary: revocation of trust.

him, and upon all claiming by, through, or under him. See *Jones v. Nicholas*, 151 Iowa, 362; *Love v. Blauw*, 61 Kan. 496 (59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334); *Forney v. Remey*, 77 Iowa, 549; *Lewis v. Curnutt*, 130 Iowa. 423.

As said in *Cameron v. Cameron*, reported in 10 Smedes & M. (Miss.) 394 (48 Am. Dec. 759): "In a case of this kind the only inquiry need be whether the deed of the husband is absolute and irrevocable or not. It is the undoubted right and privilege of a husband to dispose of his personal estate in any manner he thinks proper in his own lifetime, and to thus cut off his widow from dower in such property; and a voluntary conveyance will be good against the claims of the widow."

In determining whether an instrument, such as we have here; is a deed or a will, the main question is: Did the maker intend to convey an estate or interest that should vest before his death, and immediately upon the execution of the instrument, or did he intend that all the interest and estate affected by the instrument should pass only after his death? If the instrument passed a present estate, and passed the title and right to possession to the property involved, immediately upon its execution to the trustee named therein, it is effectual, although the enjoyment of the thing conveyed in the parties named as beneficiaries is postponed to a future date. All that is necessary is that the donor or grantor should have absolutely parted with his interest, and have effectually put such interest beyond his reach. *Vosburg v. Mallory*, 155 Iowa, 165; *Lane v. Ewing*, 31 Mo. 75 (77 Am. Dec. 632). See, also, *Wilson v. Carrico*, 140 Ind. 533 (40 N. E. 50, 49 Am. St. Rep. 213).

. *In Re Estate of Podhajsky*, 137 Iowa, 742, it is said: "It is immaterial whether we call the transaction now under consideration (and we might remark this is a case very much like the one at bar) a gift by the deceased to his daughters, or a trust established by him for their benefit. Indeed, a voluntary trust is simply a device by which a donor effectuates a gift,

either of property or of its beneficial use and enjoyment, to a designated donee. Even a gift *causa mortis* may be effected by delivery to a third person in trust for the donee, although the gift does not come to the knowledge of the donee, and is not accepted by him until after the death of the donor. The acts of the trustee or third person receiving the property for the benefit of the donee are deemed to be in the interest of the latter, and the acceptance of the gift is presumed"—citing *Clough v. Clough*, 117 Mass. 83; *Gerrish v. Institution*, 128 Mass. 159 (35 Am. Rep. 365) and other cases. See, also, *Dettmerr v. Behrens*, 106 Iowa, 585.

It has even been held that a reserved power in the grantor to recall the grant, which has not been exercised during the life of the grantor, does not destroy the effectiveness of the grant. *Lippold v. Lippold*, 112 Iowa, 134; *Newton v. Bealer*, 41 Iowa, 334.

In *Lewis v. Curnutt*, *supra*, this court said: "The same purpose to direct and control the disposition of property beyond the life of the owner is very frequently accomplished through a trustee, who may be appointed by will, or by deed, or by other suitable declaration of trust. Subject only to the condition that the purpose of the trust be not in contravention of the command or policy of the law, the right and power of the owner of property to thus dispose of it is elementary"—citing *Hollis v. Drew Seminary*, 95 N. Y. 166, in which it is said: "The general rule is that one may do with his property as he pleases. He may dispose of it by will in any way that suits his fancy or his judgment. He may give it all to strangers, and thus disinherit his relatives. He may give it all to natural persons or to corporations capable of taking. He may give it directly, or create trusts which the law allows; and this general power of disposition he possesses down to the last hour of conscious, intelligent existence." It is further said in this case: "Whether the trust be created by will or by deed, if it be lawful, and the intent can be fairly ascertained from the examination of the instrument, the courts will

uphold and enforce it. . . . 'The intent of the settlor in the creation of trusts is what the courts look to, . . . and that intent is to be carried into effect, unless it contravenes some public policy of the law.' " It is further said in *Lewis v. Curnutt, supra*: "Moreover, it must be remembered that it is not necessary in any case to the establishment of a trust that any beneficial interest shall pass to the trustee. From its very nature, a trust involves the idea of a separation of the beneficial interest from the legal title. When a trust is executed by the delivery of a simple conveyance to the trustee, that act and instrument serve to pass an immediate present interest to the *cestui que* trust, no matter how far in the future the enjoyment of the benefit thus provided may be deferred."

In *Forney v. Remey*, 77 Iowa, 549, it was expressly decided by this court that one owning property, real or personal, may transfer and convey the same to a trustee, to be held for his own benefit, or for other beneficiaries. The instrument in this *Forney* case, upon its face, was a conveyance in trust for the benefit of the grantor and others who were named as beneficiaries upon the face of the instrument. The instrument assigned, transferred and conveyed certain accounts and personal property to a certain person named as trustee, a schedule of which was attached. Following the naming of the trustee, and the transfer of the property in the instrument set out, the trustor made provision that the trustee named in the instrument should hold the property, and, after deducting from the interest, rents, income, and profits any expense attending the execution of the trust, the trustee should pay to the trustor all the interest, rent, and income, and profits arising from such property, such payments to be made during her natural life, and at the death of the donor or trustor the property to be distributed among those named therein as beneficiaries. The court said: "The plaintiff's counsel insist that the instrument witnesses a gift *inter vivos*, . . . is not valid, for the reason that it is testamentary in its character. It is plain that the conveyance is not a gift

inter vivos. The grantor herself is named as the first beneficiary, retaining the power to direct the investment of the funds arising from the property. The other beneficiaries can, under the instrument, receive no benefits from the property until after the death of the grantor. Nothing further need be said in order to refute utterly plaintiff's position that the instrument witnesses a gift *inter vivos*." The court further said: "The property, under the instrument, passes to the defendant, who takes it as a trustee, and holds it subject to the terms of the trust. The title passes . . . *in praesenti*. It does not await the death of the grantor. She lost ownership and control of the property by the execution of the deed. . . . There is nothing in the conveyance . . . suggesting an idea of a future power of disposition retained by the grantor. She could not revoke the grant, nor in any way change its terms and conditions."

Many more cases might be cited in support of the defendants' claim; but we do not deem it necessary to make reference to them, for the reason that every question raised in this case has been fully and fairly met and decided by our own court, and each case is amply supported by well-considered cases from other states.

The question in this case then is: Do the instruments herein relied upon meet the requirements of the law as hereinbefore stated?

The instrument under consideration provides: "I will place in the hands of my two sons, H. E. Haulman and B. T. Haulman, the sum of \$2,500.00."

It appears that on the date of the execution of this instrument he did place \$2,500 in the hands of these two sons. It appears that he placed this money in their hands as trustees, not only of that sum, but any and all other sums that might be added to it; that he placed it in trust with them for the use and benefit of his children named in the instrument.

3. SAME: wills:
gifts:
distinction.

It appears that Harry Haulman, the creator of the trust,

had, at the time the instrument was executed, \$2,500 in money; that he paid this money to the defendants, to be held by them in trust for his children; that by the instrument, he created them trustees of the fund, and retained no control over the fund, no right to withdraw it from their hands, or direct its disposition other than is shown in the instrument creating the trust. It appears that this money, so delivered to these trustees, was never withdrawn by Harry Haulman, and was in the hands of the defendants, as trustees, under the trust instrument at the time this action was commenced. It is true that in the instrument he directed his trustees as to the management of the fund, but assumed no control over the management of it himself, and directed his trustees, upon his death, to distribute the fund to the beneficiaries named in the trust deed, as therein provided.

It is true that the trust deed and the will undertake to dispose of and control property not shown to have been in existence at the time of the making of the trust deed and will, and property which does not appear to have ever been delivered by him to the trustees. This does not affect the trust character of the property in controversy, which was, in fact, delivered to, and retained by, the trustees under the trust deed, and which is the property in controversy here. The will in no way changes or attempts to change the disposition of this fund in the hands of the trustees. Nor is it in any way inconsistent with the provisions of the trust deed.

Thus a proper construction of this instrument shows that the property in controversy under the instrument in question passed to these defendants as trustees; that they took it, and were holding it at the time this action was commenced, subject to the terms of the trust; that the title to this money passed to these trustees immediately upon the execution and delivery of the trust deed and the property; that the maker of the trust deed retained no personal control over the property after the execution of the instrument, and the delivery of the same to the trustees; that, by the execution and de-

livery of the deed and the property to these trustees, he then lost ownership and control of the property. The instrument itself suggests that he retained no power over the property that would enable him, in the future, to make any other different disposition than was provided for in the instrument. He could not revoke it, or in any way change its terms and conditions. The legal title passed to the trustees. The beneficial interest passed to his children. Both the legal title and the beneficial interest passed, upon the delivery of the instrument and the property, to the trustees, and the instrument itself shows that that was his purpose and intent. He had a legal right to make the instrument at the time. He had a legal right to transfer the property direct, if he so chose, to the beneficiaries named therein. If he had done so, no question could possibly have arisen such as we have before us now. He chose, however, to pass the legal title to these defendants, and the beneficial interest to the beneficiaries named in his deed. Having parted with both, nothing remained in him, at the time of his death, that could possibly pass to his executors under the will.

The cases cited by counsel for appellant fail to support their position that the instrument in question is not a trust deed, operating in *praesenti*. The instrument itself, upon its face, under the holdings of this court heretofore referred to, shows that the instrument is not a testamentary writing, and does not witness a gift *inter vivos*. Without reviewing the cases cited by appellant, we are satisfied with the holdings of this court, heretofore made, which, an examination shows, are amply supported by the best authority.

We find no error in the record, and the cause is—*Affirmed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concurring.

In the Matter of the Estate of Otto W. Wittick, deceased.
ADOLPH J. WITTICK, GUSTAVE A. WITTICK, CARL HERMAN
WITTICK and WILHELMINE OPFERKUP, Appellants, v.
EMILIE ENGLE WITTICK, Appellee.

Marriage: CONSANGUINITY: VALIDITY. A marriage between first
1 cousins solemnized in violation of a statute prohibiting such marriages is void; and a common law marriage between cousins unless consummated prior to the passage of such a statute is also void.

Same: EVIDENCE: TRANSACTIONS WITH A DECEDENT. In an action to
2 establish the rights of claimant in a decedent's estate by virtue of an alleged common law marriage, evidence that claimant was expecting to marry decedent until she discovered that he was addicted to the use of liquor, when she declined unless he should reform, but that after some time and an apparent reformation she consented, was inadmissible under the statute prohibiting conversations with a decedent, except so far as it tended to show claimant's intent and the circumstances under which their relations began.

Same. Evidence of claimant, seeking to establish a right in the estate
3 of decedent under a common law marriage, that from the time she had agreed to marry decedent she considered herself as his wife, and that the formal ceremony should be performed when they could go to the proper church, was admissible on the question of her intent, and is not prohibited as a communication with decedent.

Same. Evidence showing the relation of parties after the passage of
4 a law prohibiting their marriage because of consanguinity is admissible, not to show a common law marriage after that date but as explaining the relation of the parties prior to the passage of the law.

Same: COMMON LAW MARRIAGE: EVIDENCE. A mutual agreement to
5 presently become husband and wife, followed by cohabitation as such, constitutes a valid common law marriage of parties not legally disqualified from marrying; and if the relations prior to the passage of a disqualifying statute were such as to constitute

a valid common law marriage, neither the enactment of the statute nor a subsequent invalid marriage ceremony would affect the previous marriage by agreement. In the present case the evidence is held to show a valid common law marriage between first cousins prior to the passage of the statute prohibiting such marriages.

Appeal from Hancock District Court.—HON. C. H. KELLY,
Judge.

TUESDAY, MARCH 17, 1914.

PROCEEDING to establish rights in an estate under a common-law marriage with decedent. From judgment in favor of the defendant, finding that she is the widow, the plaintiffs appeal.—*Affirmed.*

Senneff, Bliss & Witwer, and Williams & Clark, for appellants.

Sol Levisohn, and John Hammill, for appellee.

WITHROW, J.—I. Otto W. Wittick having died intestate in October, 1911, a resident of Hancock county, application for the appointment of an administrator of his estate was made by Emilie Wittick, who claimed to be his widow, and, waiving her right to act, she requested the appointment of another, which was done. Following this, an application to set aside the appointment was made by Adolph J. Wittick, a brother of the decedent, alleging that Emilie Wittick was not the widow of Otto W. Wittick, that she was his first cousin, that a pretended marriage ceremony between the parties was performed in Illinois, but that under the laws of that state, which prohibited the marriage of first cousins, the marriage was void; and that at the time of such ceremony the laws of Iowa made a like prohibition. Based upon these averments, he asked to be appointed administrator of the estate of his brother. Emilie Wittick, as we shall hereafter speak of her

in this opinion, appeared in resistance to the motion, averring that she and Otto W. Wittick lived together as husband and wife, commencing the latter part of March, 1909; that such was generally known; that the decedent from that time and up to his death held out to the world that they were husband and wife; and that she became the common-law wife of Otto W. Wittick in March, 1909. Following this resistance, she made application for one year's support from the estate, as widow, to which objection was made by the brothers and sister of the decedent upon the grounds presented in their motion to set aside the appointment of administrator. Trial was had upon the issues thus raised, and judgment was entered finding Emilie Wittick to be the widow of Otto W. Wittick, deceased, and granting to her an allowance from the estate for her support. From such finding and judgment this appeal is brought by the brothers and sister of decedent.

II. Before going to the facts, we give attention to the law as determining the right upon which the claim of the appellee must rest. The fact that the parties were first

cousins is not disputed. Upon the trial it was
1. **MARRIAGE: CON-** conceded that the statute of Illinois, at the
sanguinity:
validity. time the marriage ceremony was performed in that state, which was in September, 1909, prohibited the marriage of first cousins and declared marriages entered into in violation of such provision to be void. In Iowa a like statute went into effect on July 4, 1909, but prior to that date marriages in this state within that degree of relationship had not been prohibited. It therefore must be held that no rights were acquired by the appellee under the Illinois ceremony, and also that no rights could arise under a common-law marriage in Iowa, between cousins, unless such was entered into prior to July 4, 1909, and supported by facts as to such relation prior to that time as are necessary to meet the degree of proof required to establish such a status. *Drummond v. Irish*, 52 Iowa, 41. The single question which is left for consideration is whether, as claimed by the appellee, a common-

law marriage contract was entered into in Iowa between herself and Otto W. Wittick in 1909, prior to the time that the marriage of first cousins was prohibited by the law of this state.

III. Emilie Engle Wittick, the appellee, was at the time of the trial about thirty-one years of age. She came to the United States when she was eighteen years of age, and about four years later was married to her first husband, Charles Engle, in New York City. Four years later he died, and she returned to her old home in Germany for a visit. Later, on her return to this country, upon the suggestion of her brothers, a correspondence was opened between herself and Otto W. Wittick. He was at the time a resident of Waterloo, in this state, and unmarried, having been divorced from a former wife, and it is satisfactorily shown by the competent evidence that she came to Waterloo at the request of Wittick, and with the expectation upon the part of both that they would be married. After her arrival in Waterloo with her little son by the former marriage, she became the housekeeper for Otto W. Wittick, this being in October, 1908, and continued in that relation until the spring of 1909, when they removed to Steamboat Rock, Iowa, where he purchased a butcher shop, and entered upon that business, and their residence at that place was continued until late September of that year, when the business was sold by him. At the time the appellee came from New York at the request of Wittick, he was addicted to the use of intoxicating liquor, and while they resided in Waterloo he went away to take the cure at some institute, and returned about March 1, 1909.

Evidence was offered and introduced over the objections of the appellant as to conversations had between the parties both before leaving and after his return to Waterloo from his treatment, the effect of which was to show that while she came west expecting to marry him, upon discovering his habits she declined to do so unless he showed reformation; and that

2. SAME: evidence: transactions with a decedent.

upon his return, with the renewed request to enter upon the marriage relation, she still declined, until after about three weeks had passed and he seemed to have conquered his habit, when she consented to so do. This evidence, and much of like purport, being of conversations between herself and Wittick, at the time of the trial deceased, was objected to as being incompetent under section 4604 of the Code. As a reason for receiving it counsel for appellee urges that the testimony comes within the exception of the statute which provides that the prohibition shall not extend to any transaction or communication as to which the opposite party shall be examined in his own behalf. That exception but opens the way for proving an entire conversation or transaction when a part of it has been proven by the opposite party, or when the proof of such party as to the particular conversation or transaction is such in effect as to disclose the transaction in whole or in part, and subject it in its entirety to investigation and proof. Much of the testimony objected to in this case was of conversations between the appellee and Wittick, as to which no other witness had testified, and we think it comes clearly within the rule of the statute, and is incompetent as proving an agreement, but is in part admissible as proof of her intent and the circumstances under which their relations commenced. This question had consideration *In re Boyington's Estate*, 157 Iowa, 467, decided by this court, where the question of a common-law marriage was being considered, and in which the following language was used: "No doubt as a witness he (the appellant) would have been incompetent to testify to any transactions or communications with the deceased amounting to a mutual agreement to marry, but he was not incompetent to testify as to his own purposes and intentions and the circumstances under which their cohabitation was begun and continued." During the residence of the parties at Waterloo there is shown by the record no public declaration by either of them that they were married, although they occupied the same room, and as to each other maintained that relation.

It was while residing there that the appellant claims the agreement was made between them that from that time on they should be as married, and that when they were able, to go to the church of her choice, the German Apostolic, there being none at Waterloo or at Steamboat Rock, where they afterwards went to reside, the formal ceremony should be performed.

She also testified, and this we think was competent as bearing upon her intent, that from that time on she considered herself to be his wife, and that the formal ceremony should

3. SAME. be performed when they could go to the proper church. While much of this testimony is incompetent as being of conversations with the deceased, that to which we have just referred, with other evidence, sheds light upon the intent with which she entered upon and sustained the relations with Wittick which are shown by the evidence.

The parties left Waterloo about April 20, 1909, going first to Des Moines, where they stopped at a hotel, where she was introduced by him to the proprietor as his wife, and they were so registered. Her little son was with them, and they occupied one room, the boy sleeping on a cot. After remaining in Des Moines four or five days, they went to Steamboat Rock, staying for two nights at the home of Chas. Hess, to whom the decedent introduced the appellee as his wife. They soon procured a house, and established a home. From and after the time they removed to Steamboat Rock, the evidence shows that he often introduced her to others as his wife, that the little boy called Wittick papa, that at the meat market she met the customers to whom she was introduced as his wife, and no evidence as to their life in that place tends to show any other relation or purpose, or any knowledge, understanding, or belief of others casting doubt upon the legitimacy of their relations. As tending to show a holding out to the public of their relations as man and wife after their arrival at Steamboat Rock, a witness, Ole Matheson, testified that he worked in the butcher shop which was sold to Wittick, in

April, 1909, by Chas. Hess, and continued to so work after the change in ownership; that he met Mrs. Wittick in the shop and was introduced to her by Wittick as his wife; and that he at different times heard him so introduce her to others. He testified that they were keeping house there, and that it was generally understood that they were husband and wife. The witness testified that he later purchased the business, and that Mr. and Mrs. Wittick both signed the papers which were evidence of the sale. His purchase of the shop was in September, 1909, and before the Illinois ceremony was performed. He also testified that the little boy called Wittick his papa.

Chas. Hess, by whom the butcher business at Steamboat Rock was sold to Wittick, testified that in April, 1909, after the purchase, Wittick informed him of his desire to rent a house, stating that he had a wife and one boy; that they soon after moved there, and he was introduced by Wittick to Mrs. Wittick, as his wife; and that she also was so introduced by Wittick to Mrs. Hess; that they occupied one room in his house, until their household goods arrived. He testified that he saw Wittick introduce her to a number of persons as his wife; that he supposed they were husband and wife; that "he brought her there as his wife, introduced her, lived with her, and we all thought she was his wife."

One Turner was cashier of the bank at Steamboat Rock at the time the Witticks resided there. He testified that he thinks he was introduced to her by Wittick as his wife, but was not certain, but he did hear him so introduce her to others; that she assisted him in the shop, spoke to him as her husband; and it was generally understood that she was his wife. This witness testified that he drew the instrument conveying the meat market, including certain real estate, a certified copy of which was introduced in evidence, and that it was signed by O. W. Wittick and Emilie Wittick. This instrument was signed and acknowledged September 4, 1909, and recited that they were husband and wife. While at Steamboat Rock Mrs. Wittick received mail addressed to her as Mrs. E. Wittick,

one card of date September 4, 1909, written from Parkersburg, Iowa, signed, "Your husband, O. Wittick," and others from friends or relatives in the East, all of which were prior to the Illinois ceremony, and after July 4, 1909.

As to all of the evidence relating to transactions after July 4th, objection was made on the ground that it was incompetent to prove a common-law marriage, as at such time

under the law of this state such could not be
4. SAME. contracted between the parties because of their blood relationship. We think the evidence was competent, not as tending to show a relationship entered into between the parties after that date, but as bearing upon and explanatory of what had preceded that time.

Excluding that part of the testimony of Mrs. Wittick which was of personal transactions and communications, the foregoing is, in substance, that upon which the case of the appellee must rest.

The evidence on the part of the appellants was to the effect that at Waterloo the appellee was known as Emilie Engle, that she was so known by the brothers and relatives of the deceased, and that while residing there there was no claim that she was his wife; and a brother whom they visited when passing through Des Moines, on their way to Steamboat Rock, knew her only as his cousin, although he knew they were staying at the hotel.

Adolph J. Wittick, a brother, testified to a conversation with Mrs. Engle in Waterloo shortly after she came out from New York, in regard to her marrying Otto. She said that he had written her to come, and that Otto promised to be a sober man, and he would marry her some time later; and that she was dissatisfied when she saw how heavily he was drinking, and that he (Adolph) urged her to stay and keep house for Otto. That marriage between the parties was contemplated clearly appears from his testimony, although he says he never advised it. He also testifies that shortly before they removed to Steamboat Rock, after Otto had been drinking again, that

he (Adolph) advised the purchase of a meat market in a small town, and that he requested the appellee to go with him, to give Otto a trial, to which she finally consented, and that if he did keep sober for a year she would marry him. On cross-examination he said that he had thought it would be a good thing for him to marry her if he would straighten up. She said she never would marry him unless he became a man. Other witnesses on the part of the appellant testified as to facts bearing upon the relations of the parties while at Waterloo, but presented nothing in contradiction of the proof as to their relations while at Steamboat Rock. The foregoing is a fair summary of the testimony.

IV. As to what constitutes a "common-law marriage," and what evidence is competent to establish such a relation, is a subject upon which the authorities are in harmony, the difficulties presented in such cases arising under

5. SAME: common law marriage: evidence.

the facts. *In re Boyington's Estate, supra*, states the rule that: "While cohabitation and the reputed relation of husband and wife may be shown as tending to give color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife." And in determining the question public conduct of the parties, and public repute, if uniform, is entitled to weight. *Pegg v. Pegg*, 138 Iowa, 576. In the case of *McFarland v. McFarland*, 51 Iowa, 570, this court held that, while cohabitation does not of itself constitute marriage, yet it is sufficient if the parties so cohabiting intend present marriage; and in the earlier case of *Blanchard v. Lambert*, 43 Iowa, 228, was quoted and adopted the settled rule of the common law that "any mutual agreement between the . . . husband and wife *in præsenti*, followed by cohabitation, constitutes a valid and binding marriage, if there is no legal disability on the part of

either to contract matrimony." The rule is also recognized in *Leach v. Hall*, 95 Iowa, 611, and *State v. Rucker*, 130 Iowa, 239; 26 Cyc. 872.

The relation between the parties from the time of taking up their residence at Steamboat Rock in April, 1909, up to the time of the ceremony in Chicago, in September of the same year, was, so far as appears from the testimony, in all respects as of husband and wife. That it had been their intention or expectation to marry when she came out from New York is clear, and that marriage was postponed because of his habits is satisfactorily shown by competent evidence. We think it also is quite within the proof that from the time of their going to Steamboat Rock there was on the part of both a present intent to maintain towards each other and to the world the status of husband and wife; and he so held her out to the public, she so recognized him, her little son, so far as he could give like recognition, and this was presumably with the consent of both, as they knew of it. She entered into his business transactions with him, and when necessary joined as his wife in the conveyance of real property; there was public recognition of them in their presumed married state; and at no time was there any question raised as to it. This relation began at a time when the marriage of first cousins was not prohibited in this state, continuing without interruption up to the time of the Illinois ceremony, and was maintained until his death, which was shortly after.

If the relation between the parties prior to July 4, 1909, had been of such nature as to establish the common-law marriage, the subsequent law could not affect it; nor could the ceremonial marriage later performed add to or diminish the legal strength of their relationship. As to this latter, it is urged that the relations of the parties were up to that time incestuous, existing only in contemplation of the future marriage, and that the fact that the ceremony was had is strong evidence that they had not previously been to each other and to the public as husband and wife.

But we think a fair reading of the record in the case leaves no reasonable doubt, indeed it affirmatively shows, that the relation was actually entered into in April or prior to that in 1909, with the intent to be husband and wife, followed by that public recognition which met the requirements of the law, and that the subsequent ceremony, invalid though it was, but not shown to have been so known to the parties, was but the formal and ceremonial recognition of that which had been assumed by them under an agreement and with their present intent that from such time forward they were husband and wife.

The conclusion of the trial court was right, and it is—
Affirmed.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

WHEELER LUMBER, BRIDGE & SUPPLY COMPANY, Appellee, v.
GEORGE F. WHITE and CAROLINE WHITE, Appellants.

BURNETT BROTHERS, JOHN G. BURNETT, CHARLES R. BURNETT
and CARR & ADAMS COMPANY, Appellees.

Mechanics liens: CONTRACT BY AGENT: RIGHTS OF PARTIES. Where a
1 contract was made by the husband for the construction of a build-
ing upon land belonging to the wife, but she approved of the same
and knew of the progress of the work and of the claims of the ma-
terialmen, so far as her rights and those of the materialmen were
concerned the contract was of the same force as though made by
her.

Same: TIME FOR FILING NOTICE: EVIDENCE. In this action to estab-
2 lish a mechanics lien the evidence is held to show that the last
item of the account was actually delivered on the date of the
charge, and that the time for filing notice of the lien began to
run from that date.

Same: RIGHTS OF SUBCONTRACTORS. Ordinarily subcontractors can
3 only claim a lien upon the funds in the hands of the owner of the

building and the principal contractor, but where the owner paid materialmen whose liens had not been filed, with knowledge of the claims of subcontractors, he was liable for such claims thereafter filed in time.

Same: PERFORMANCE OF CONTRACT: EVIDENCE. In this action to establish subcontractors liens the evidence is held to show a substantial compliance by the original contractor with his contract.

Appeal from Polk District Court.—HON. HUGH BRENNAN, Judge.

TUESDAY, MARCH 17, 1914.

PROCEEDING to establish liens of subcontractors for material furnished in the construction of a dwelling. From a decree in favor of plaintiff and cross-petitioner, the defendants George F. White and Caroline J. White appeal.—*Affirmed.*

Ryan & Ryan, for appellants.

Graeser & Meyer, for appellees, except Burnetts.

WITHROW, J.—I. The plaintiff, Wheeler Lumber, Bridge & Supply Company, commenced this action to establish and foreclose a mechanic's lien, making the owners of the property, the contractors, and Carr & Adams Company, a junior lienholder, defendants. The contractors made default, the owners denied liability, and the junior lienholder filed a cross-petition, asking that its lien be established and foreclosed junior to the lien of the plaintiff. Upon hearing, the trial court entered judgment against the contractors for the amount of the claims of plaintiff and cross-petitioner, and established the claims as liens in the order prayed, from which the owners appeal.

II. On September 26, 1911, Geo. F. White entered into a written contract with Burnett Bros. under which the latter

were to furnish the material and construct a dwelling "on land owned by party of the first part," according to plans and specifications, for a total consideration of \$3,510, which was to be paid in certain amounts at different times as the work progressed, aggregating \$2,225, and the balance, or \$1,285, was payable when the dwelling was completed.

1. MECHANIC'S
LIENS: contract
by agent:
rights of
parties.

The land, in fact, belonged to Caroline J. White, the wife of George F. White, but it is shown by the testimony of both husband and wife that the contract was made with her approval; that she had knowledge of it; and that at all times during the progress of the work she knew of it and of the claims of various materialmen. She claims, however, that she expressly stated that she would expend only \$3,510 in the construction of the dwelling, and that, as the establishment of the liens sought to be enforced in the present action would exceed the total amount payable under the contract, she nor her property cannot be held liable for such excess. In her testimony she stated that she recognized her liability for certain extras which had gone into the building, and which would increase the total cost. Other conditions permitting, the right to a lien upon her land for material used in the building, under this showing of facts cannot be questioned. *Rand v. Parker*, 73 Iowa, 396. The record shows that during the progress of the work White paid to the contractors various amounts aggregating \$2,125, the last of which was on March 16, 1912. The claims for liens which are made by the plaintiff and by the cross-petitioners are for material which either admittedly went into the building, or is proven by such facts as satisfy us that the defendants received the benefit of all for which claim is made.

The last item in the claim of the Wheeler company is dated May 13th, and is for roofing material, the amount charged being \$2. The next preceding item in the bill is dated March 11th. The claim for mechanic's lien, as a subcontractor, was filed by plaintiff June 12, 1912, or within thirty days after May 13th. Upon

2. SAME: time for
filing notice:
evidence.

the claim that the filing was too late, evidence was introduced on the part of the defendants tending to show that the item of May 13th was not furnished, and that therefore the rights of the plaintiff must depend upon its account with the last item being March 11th. The evidence shows that a charge ticket for that item was made by plaintiff in the usual way of business, although there was a dispute as to the actual delivery, but their records do so state, and it is upon this that the appellant relies; but it does appear that material of the kind for which the charge is made was used as roofing for the porch some time in May, this being testified to by appellant, and also by men who were then engaged in the work, and from it we hold that the charge was a proper one.

III. Reaching the conclusion that the claims for liens were filed in time, and also that the rights and liability of Mrs. White must in all respects be determined as though she had personally made the contract with the Burnett Bros., and as though she had performed the acts done by her husband in settling with materialmen, as such will be hereafter considered, we turn to the facts bearing upon the claims of the Wheeler Company and the Carr & Adams Company, which were, by the decree of the trial court, established in the amounts claimed as liens against the property, there being no real dispute as to the items, excepting as we have stated, but upon their right to liens.

IV. It is urged by the appellants that the contract provided that the payment of the balance above the \$2,225, which was to be paid at various times, was not due until the building was completed; that there was a failure on the part of the contractor to do the work according to the plans and specifications; that it was defective or inferior in many respects, and unfinished; and that therefore the final payment was not due; and that the claims of subcontractors can only be asserted against a payment or obligation at the time actually due. There can be no question of the rule in its general application that the sub-

3. SAME: rights
of subcon-
tractors.

contractor can only assert his claim against such rights as are held by the principal contractor (Code, Section 3093), and that the owner cannot be compelled to pay a greater amount than is provided in his contract. But, as recognized in cases which we will later consider, there may arise instances when, from some act of the owner in which he fails to protect himself against outstanding material claims of which he has knowledge, that the rule of liability upon which the appellants rely does not control.

The last item in the account of Carr & Adams Company was January 30, 1912, and their claim for lien was filed June 13th following. To bring themselves within the protection of Code, Section 3094, as to claims of subcontractors filed after thirty days, a notice as provided by that section was served upon Mrs. White. While appellants admit the presence at their home of the officer whose return shows the service, and its manner, they deny that service was had upon them. The return of the officer, which is presumptively correct, is supported by his testimony as to what was done; and from the record we are satisfied with the conclusion upon this branch of the case that there was proper service of the notice. The claim for a lien of the Wheeler Company, filed June 12th, was in time under Code, Section 3093, and that of the Carr & Adams Company filed June 13th, and followed immediately by the notice to the parties, gave to each the general rights of subcontractors. We must then determine whether, under the facts shown in this record, as subcontractors, there was a fund due and payable under the original contract which is subject to their liens.

V. It is conceded that the appellants paid, on the order of the contractor, to the Des Moines Clay Company \$100 on July 6th and \$200 on July 7th; to Edwin Cutler, plumber, \$275 on April 13th; Clifford & Company, April 29th, \$169.80; Garver Hardware Company, July 18th, \$75; and the Citizens' Electric Company, July 27th, \$30—all of such payments being on account of material used in the construction of the

building, but for which no liens had been filed. It is admitted by the appellants that the material furnished by the Carr & Adams Company was delivered upon the property before January 30, 1912, and that they knew that to be true before the claim for a lien was filed by that company, and the proof shows that White knew in late December or early January, 1912, that their bills had not been paid. Appellant White also testified that he knew on April 15th, when he was paying other material bills, that the Wheeler and the Carr & Adams claims had not been paid. It also appears from the evidence that, after the last payment was made to the contractor, including claims for extras, there was payable about \$1,500 on the contract.

The claim of the Wheeler Company is \$578.83, and interest, and that of the Carr & Adams Company \$157.45, and interest, which amounts, added to the payments made to other materialmen, exceeds the balance payable under the contract. From these facts we must determine the effect which follows the payment of certain material claims to the exclusion of others of which the parties at the time had knowledge. Appellants knew or were presumed to know of the right of subcontractors to file and establish their liens, and which would be good as against any material claims not so established. Charged with such knowledge they made payments from the balance which would be due the contractor upon the completion of the work, to the exclusion of other creditors of whose claims they knew. With such knowledge it became the duty of the appellants in justice to all material claimants whose rights to liens might yet be asserted, to make no payments until liens were filed, and then to have them discharged in accordance with the provisions of the statute, which is aimed to protect the owner and also the diligent claimant. *Othmer Bros. v. Clifton*, 69 Iowa, 656; *Queal v. Stradley*, 117 Iowa, 748; *Simonson v. Bank*, 105 Iowa, 264; *Green Bay Lumber Co. v. Adams*, 107 Iowa, 672. Under the rule of these authorities,

the payments paid to other materialmen are no protection to the appellants; and the fund from which the payments were made must be treated as being first subject to the claims of the plaintiff and cross-petitioner, appellees, unless it shall be found that, according to the terms of the contract and the acts of the parties under it, no amount was shown to be due to the contractor.

VI. We have referred to the condition in the contract that the final payment should not become due until the building was fully completed; and have also mentioned the claim of appellants that there was a failure in several respects to complete it according to the plans and specifications. It should be said that the plans were roughly drawn by White, with a pencil, as he testifies, according to scale. These were not specifications, but merely the pencil sketches. One complaint is that the building is in its size less than was provided for, but it appears that appellant White assisted in marking off the ground which was to serve as its base, that he was present at all times during the progress of the work, and made no objections. It also appears that the owners, after moving into the home, which was before all of the work had been finished, expressed themselves as satisfied. Many items of alleged defects are mentioned, but we do not find them to be of substantial character, while, as to others, we think the evidence most satisfactorily shows that the claim of fault is without sound basis. But beyond this, in making payments to the materialmen who did not file their claims for a lien, the appellants did not rely upon the provision of the contract, and payments also had been made direct to the contractor without regard to its terms. Under such conditions, under the rule stated in *Simonson v. Bank*, *Green Bay Lumber Company v. Adams*, and *Queal v. Stradley*, *supra*, the appellants must be held to have waived that right, if it then rested in them, and by their acts to have set apart the fund so applied

4. SAME: performance of contract: evidence.

by them to the payment of material claims; and, as the rights of the appellees were first asserted in the proper way, their claim for priority must be upheld.

The decree of the trial court establishing the claim of the Wheeler Company as a first lien upon the property, and that of the Carr & Adams Company as a second lien is correct, and it is—*Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

JOHN BUCKMILLER, Plaintiff and Appellee, v. CRESTON, WINTERSET & DES MOINES RY. Co., Defendant and Appellant.
H. J. HARBOUR, Defendant.

Condemnation of property: APPEAL: NOTICE: SERVICE: PARTIES:

1 **JURISDICTION.** The fact that notice of appeal from the award of a sheriff's jury in condemnation proceedings is required by the statute to be served upon the sheriff does not make him a party to the suit, nor prevent him from serving notice on the adverse parties; and where the notice of appeal, sufficient in substance, was addressed to the adverse party and also to the sheriff who accepted service for himself, and which was properly served in due time upon the adverse party, the court acquired jurisdiction.

Same: NOTICE OF APPEAL: SERVICE: RETURN: AMENDMENT: JURIS-

2 **DICTION.** It is the fact of service of notice of appeal and not the form of proof of service that confers jurisdiction; and although the return of a sheriff may show that without authority so to do he served the same as sheriff, he may, after a motion to dismiss the action on that ground, amend his return to show that he served it as an individual, proving the service by affidavit, and thus give the court jurisdiction.

Same: NOTICE OF APPEAL: PARTIES: PREJUDICE. The fact that a

3 sheriff, who conducts condemnation proceedings, was included and named in the notice of appeal as a defendant did not make him a party to the suit; nor will such fact alone disqualify him from serving the notice: and the defendant cannot complain that he

was thus included rather than named in and served with a separate statutory notice, on the ground that it was prejudicial.

Appeal from Adair District Court.—HON. J. H. APPLEGATE,
Judge.

TUESDAY, MARCH 24, 1914.

THIS case involves the sufficiency of the service of notice of appeal from the action of the sheriff's jury in assessing damages to plaintiff's property, in a proceeding instituted by the defendant in which it condemned a right of way over plaintiff's land for railway purposes. Defendant's motion to dismiss the appeal made in the district court for want of sufficient notice of appeal having been overruled, defendant appealed.—*Affirmed.*

Brown & Johnston, for appellant.

Geo. D. Musmaker, for appellee.

GAYNOR, J.—On the 26th day of October, 1912, the plaintiff filed in the district court of Adair county his notice of appeal from the award of commissioners, appointed by the sheriff of said county, to assess the damages for the taking of the right of way by the defendant; the plaintiff being the owner of the premises through whose land the right of way passed, and the one affected by the assessment. When the cause reached the district court, defendant objected to the jurisdiction of the court, on the ground that the notice of the appeal was insufficient to give the court jurisdiction of the defendant, and insufficient to give the court a right to hear and determine the questions raised by the appeal.

It appears, from the record, that the objection goes to the return of service, or the evidence of service. The notice

was addressed to this defendant, and to H. J. Harbour, as sheriff. Harbour was the sheriff of the county, and the one who appointed the commissioners who made the assessment. Harbour served the notice of appeal, and his return of the service is signed, "H. J. Harbour, Sheriff of Adair County," and recites that service was made on the defendant on the 25th day of October, 1912.

1. CONDEMNATION
OF PROPERTY:
appeal: notice:
service: par-
ties: jurisdic-
tion.

On the 9th day of November, 1912, this defendant filed its motion to dismiss the appeal, on the ground that the court had no jurisdiction; that there was no sufficient service of notice to give jurisdiction. Thereupon Harbour amended his return to the notice. The amended return showed that he served the notice as an individual, and not as sheriff, and signed and swore to it as an individual, and not as sheriff of the county. This was done on the 14th day of November, 1912, his return being as follows:

State of Iowa, Adair County—ss.: I, Harry J. Harbour, being first duly sworn, on oath state that the foregoing notice of appeal came into my hands for service on the 25th day of October, 1912, and I served the same on the Creston, Winterset & Des Moines Railroad Company by offering to read the same to R. Brown, president thereof, which he waived, and delivering to him a true copy of the same and that I served the same on said company by offering to read the same to R. Brown, attorney for said company, which he waived, and delivering to him a true copy of the same. All done this 25th day of October, 1912, at Creston, Union county, Iowa. [Signed] H. J. Harbour.

Subscribed and sworn to before me this 14th day of November, A. D. 1912, by Harry J. Harbour.

Thereafter, and on the 26th day of November, 1912, the court made its ruling on the motion to dismiss, and the same was by the court overruled. On the 24th day of January, 1913, the defendant filed a motion for a supplemental ruling

on the motion theretofore filed; the motion for the supplemental ruling being as follows:

Comes now the defendant the Creston, Winterset & Des Moines Railroad Company and renews its motion to dismiss plaintiff's appeal heretofore filed in this cause, and states the following reasons therefor:

(1) That in its motion heretofore filed it stated, First, that no legal notice of appeal was served on the defendant railroad company within the time required by the statutes of Iowa, and, second, that the time within which notice of appeal may be served had expired, and, third, that the court had no jurisdiction. All of which appears from defendant's motion on file.

(2) That in the first paragraph of the original motion this defendant contended against, not only the form of the notice and the time of the pretended service, but also that no service in law was in truth or in fact made, as shown by the returns; the same having been served by the sheriff beyond the jurisdiction of his county.

(3) That the court, in rendering its opinion on said motion, does not pass upon the legality of the notice, in that it does not determine whether or not the service as shown by the record, and more particularly the returns thereof, constitutes a legal and valid service in law.

Therefore this defendant renews its motion, and asks that the court render a supplemental opinion passing upon the issues presented in paragraph third above.

This motion was also by the court overruled, and, from these rulings, the defendant appeals, and assigns error.

Section 2009 of the Code provides in cases of this kind:

Either party may appeal from such assessment to the district court, within thirty days after the assessment is made, by giving the adverse party, or, if such party is a corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall, thereupon, file a certified copy of so much of the appraisement as applies to the part appealed from, and the court shall try the same as an ordinary proceeding. The landowner shall be plaintiff, and the corporation, defendant.

In a controversy of this sort, there are but two parties interested in the result—the party who seeks to condemn, and the party whose property is taken by the condemnation proceedings. The party whose property is taken has the right of appeal under the statute above set out, and his appeal is taken by serving notice upon the adverse party, or, if such adverse party is a corporation, upon its agent or attorney. Notice must also be served upon the sheriff by whom the commissioners were selected. The notice must be in writing. The sheriff, in no sense, is a party to, or interested in, the appeal. He can be in no way affected by the appeal. The notice to be served on him is required, presumably, for the reason that he is, under the law, required to file a certified copy of so much of the appraisement as applies to the part appealed from.

In this case, however, the notice was addressed to the defendant in this suit, and also to the sheriff. The notice was served on the defendant. The sheriff accepted service for himself, as sheriff. The service was made in due time, and is sufficient to give the court jurisdiction, if the proof of service was sufficient under the law to make the fact of service appear.

The notice as first returned was signed by Harbour, as sheriff, and was not sworn to. It was upon this record that the first motion to dismiss was made, and it was urged in that

2. SAME: notice of
appeal: serv-
ice: return:
amendment:
jurisdiction.
motion, not only that he was a party to the suit, and therefore incompetent to make service, or proof of service, but also that, as sheriff he had no authority under the law, to serve a notice out of his own county. But, before the ruling was made upon the motion, this return was amended to show that he served the notice in his individual capacity, and not as sheriff, and this return was sworn to.

Section 3516 provides: "Notice may be served by any person not a party to the action."

Section 3524 provides: "If service is made within the state, the truth of the return is proven by the signature of

the sheriff or his deputy, and the court shall take judicial notice thereof. If made . . . by one not such officer within the state, the return must be proven by the affidavit of the person making the same."

There is no question but that Harbour, although sheriff in fact, had a right to serve the notice as an individual, and that such service would be legal. The proof of the service, however, must be made by his affidavit. His signature alone does not prove the service. Any individual may make service of original notice anywhere within the state; but the fact of service is proven by his affidavit, attached to the service, reciting the fact of service. It is the fact of service that gives jurisdiction. The proof establishes the fact of service. Proof, made in the way the statute requires, is sufficient to give the court jurisdiction, for it is sufficient proof of actual service.

There is no question that Harbour had a right to amend the return so as to state the fact as to how the service was made. Indeed, he could have been required to do so, if a question arose as to the correctness of the return. As stated before, it is the fact of service that gives jurisdiction. The evidence of the service may be insufficient; but, if the notice was actually served, as required by law, and by one authorized, the return may be corrected, if it can be done so truthfully, to show the fact of service, and if, after amended, it appears that the person was properly served with notice sufficient to bring him within the jurisdiction of the court, the notice is sufficient to give that jurisdiction, and the court may thereupon assume jurisdiction of the party and the subject-matter of the suit, because then the evidence before the court makes it appear that the defendant, by proper process, has been brought within, and is within, and under, the jurisdiction of the court. See *Brown v. Petrie*, 86 Iowa, 581; *Hoyt v. Brown*, 153 Iowa, 324.

The fact that Harbour was named in the notice, with the defendant, does not make him a party to the suit, disqualify-

ing him from making the service of the notice. He nowhere appears as a party to the suit except in the

3. SAME: notice of appeal: parties: prejudice. notice. He is not, in fact, a necessary or a proper party. He is not affected by or interested in the controversy, or affected in the least by a determination of the controversy. The defendant was, in no way, prejudiced by the insertion of his name in the notice served upon the defendant, nor by the fact that he accepted service of the same notice. Service on him was necessary because the statute requires it; but the service is not for the purpose of making him a party to the controversy. The defendant is no more prejudiced by this manner of service than it would have been had a separate notice been served on Harbour. As said by the trial court in ruling upon the motion: "It might possibly be the better practice to give the notice to the corporation, and a separate notice to the sheriff; but the fact that both parties were notified by the same written instrument ought not to be construed as making the sheriff a defendant in the suit appealed." See *Waltmeyer v. Wisconsin, Iowa & Nebraska Ry. Co.*, 64 Iowa, 688.

That the sheriff who conducts proceedings for the condemnation of a right of way is not a party to the proceedings, see *Chicago, R., I. F. & N. W. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 60 Iowa, 35.

We see no error in the ruling of the court, and the case is —*Affirmed.*

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

JOHN TRAINOR, Appellee, v. S. ROBYN, Appellant.

Partnership: ACCOUNTING: EVIDENCE: BOOKS OF ORIGINAL ENTRY.
 Although the items of account kept by plaintiff, claiming a partnership with defendant, were not all in chronological order, but were explained as having been entered when ascertained as of the date

when and where made, the books were admissible under the statute as books of original entry in an action for an accounting. Evidence held sufficient to show a partnership.

Appeal from Sioux District Court.—HON. WILLIAM HUTCHINSON, Judge.

TUESDAY, MARCH 24, 1914.

ACTION for partnership accounting. From a decree and judgment in favor of plaintiff, the defendant appeals.—*Affirmed.*

Anthony Te Paske, and Geo. T. Hatley, for appellant.

W. C. Leonard, and Gerrit Klay, for appellee.

WITHROW, J.—I. Plaintiff sued as an alleged partner of the defendant in the purchase and sale of horses, and prayed for an accounting and judgment for an amount claimed to be due him. He claims that the partnership was orally entered into in October, 1910, and under the agreement between the parties the defendant was to furnish the money, and also feed and barn room in Hull, for the horses purchased, for which he was to receive thirty-five cents per day per head for the horses so kept and fed. The agreement as claimed by him covered the duty on his part to drive over certain counties in Northwestern Iowa and other places, and to buy such horses as he could, and that the defendant, when possible, was to assist. He claims that horses were purchased at a cost of \$8,570, afterward sold, and, after deducting the expenses of keeping and sale, there was a profit of \$1,390.25, to the one-half of which, less payments of \$239.15 received by him, he claims to be entitled. The answer of the defendant denies that any partnership was formed, but says that during a part of the time covered by the averments of the petition the plaintiff performed services for him in buying and selling

horses, and alleges that he paid plaintiff in full for the services so performed. By way of counterclaim the defendant alleges that the plaintiff performed some service for him, and that plaintiff had in his possession, received in such matter, the sum of \$52.50, for which amount judgment was asked. The counterclaim was denied. The trial court found the equities to be with the plaintiff, and that he was entitled to recover \$438.70, for which amount judgment was entered, and the defendant appeals.

II. No witnesses testified as to the agreement of partnership excepting the parties to the action the plaintiff affirming it, and the defendant denying it. The plaintiff presented a book in which he claimed to have kept the joint accounts, the items in which are said to have been entered by him at or near the time of the several transactions then showed. The appellant objected to the introduction of the book for the reason that it was not shown to be a book of original entry, and that the entries were not made at the time they purported to have been made. The objection was largely based upon the fact that all entries were not in chronological sequence; that in many instances entries of one date would follow other entries of a later date. In the book were kept the accounts of purchases, sales, and expenses. The original is not before us; but from the pages as shown by the transcript we find that with few exceptions the entries appear in the proper order of their dates. The entries as to sales and expenditures and costs of keep were not regularly given, but from the testimony appear to have been made at or about the time he obtained knowledge of such transactions as were had by the appellant when the appellee was not present, and were then entered as of the date of the respective deals. As thus proven the books were admissible in evidence under Code, section 4623, the weight which should be given to the entries being yet for the trial court or for the jury in cases tried at law.

III. The appellant did not as a witness deny that the entries in the book were correct as to time or amount, but

said that he was not told by the appellee that he was keeping books, excepting at the time a settlement was demanded. He claims and so testified that the only agreement between them was that upon the request of Trainor for an opportunity to make a dollar, stating that he knew where there were horses, the appellant said to him, "You can go right in the buggy with me, and, if you know where we can buy some horses, we will go out there and see if I can buy them. If I could buy them so they will make me a dollar," I says, "I will make it right with you." The appellant further testified that Trainor wanted to form a partnership, and offered to pay interest on the money, but that he refused to do so, and that the appellee agreed to help him upon the promise that it would be made right with him. No more definite statement appears of the contract as claimed by the appellant than is given in the foregoing quotation from his evidence. The testimony of the appellee was that he was requested by the appellant to work with him, and that they would divide the profits, that he devoted his time to the common venture from October 8th to March 4th, and that the items in his book, which he claims he told appellant he was keeping, correctly showed the transactions. Some of them, it appears, were estimated expenditures made by the appellant in the keep and sale of horses; but we do not find that they are seriously disputed, the only claim that is made being that there was no partnership, and therefore no liability. Different payments were made by Robyn to Trainor from time to time, the former handling all the money, excepting some sales made by Trainor, one of which is the basis of the counterclaim. The first payment was one-half of the profits resulting from the first purchase and sale, and others were at different times as sales would be made. During the time covered by the claim the appellee assisted another buyer in making a few purchases, and the appellant made a number in which the appellee did not participate. While the appellee himself directly bought but eight of the horses purchased on the firm account, he claims to have been

connected with all others for which charge is made, and under their agreement entitled to share in all profits during the period of their relations. The case is not free from difficulty. The contradictory claims of the parties render it necessary for us to discover, if there be such, corroboration of plaintiff's testimony to afford to him a recovery. The appellant admits that he gave to appellee one-half of the profits of the first deal, and that as other sales resulted in profits he gave him money; and also that Trainor accompanied him on many of his trips to look after horses, and that he paid his expenses.

With the exception of the few days when Trainor assisted another buyer, it fairly appears that his services were given in the purchases made by Robyn, without any proof as to definite compensation other than as testified to by him, and this is some confirmation of his claim. We must give weight to the finding of the trial court, who saw the parties, heard their testimony, and necessarily determined its weight as affected by their demeanor. We find sufficient basis for upholding the judgment reached by it, not only as to the finding of a partnership, but also as to the state of the accounts, from which we find that the amount found as due is substantially correct.

The judgment and decree of the lower court is—*Affirmed.*

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

SECOND NATIONAL BANK OF NEW HAMPTON, Appellant, v. J. J. LANIN and SARAH A. LANIN, Appellees.

Malicious prosecution: WRONGFUL ATTACHMENT: INSTRUCTIONS.

- 1 Where plaintiff in an attachment alleged that defendant was about to dispose of his property with intent to defraud his creditors, and defendant pleaded as a counterclaim that the attachment was malicious and without reasonable cause, an instruction that if plaintiff submitted the facts concerning the financial standing of defend-

ant to its attorney and was advised that it had sufficient cause for attachment, then exemplary damages should not be allowed, was erroneous; as the issuance of the attachment was not dependant upon defendant's financial condition, but upon whether he was about to dispose of his property with intent to defraud his creditors.

Same: DAMAGES: EXPENSES. Where defendant in attachment seeks 2 to recover attorney's fees expended in procuring a release of the attachment he should show the necessity for an attorney's services and the value of the same.

Appeal from Chickasaw District Court.—HON. A. N. HOBSON, Judge.

TUESDAY, MARCH 24, 1914.

ACTION upon a promissory note. An attachment was sued out and levied upon certain money and some securities, and the Darrow Trust & Savings Bank and one Condon were garnished. Defendants gave bond, and the attachments were released. Later they filed an answer, and also a counterclaim for the wrongful suing out of the attachment. On the issue joined the case was tried to a jury, resulting in a verdict for the plaintiff in the sum of \$278.57, thus in effect allowing defendants about \$170 as damages on the counterclaim, and the court added thereto the sum of \$75 to defendant's attorneys because of the wrongful suing out of the writ. Plaintiff appeals.—*Reversed.*

R. Feyerabend, for appellant.

Smith & O'Connor, for appellees.

DEEMER, J.—The action was upon a note for the sum of \$400, signed by both defendants, and payable to the plaintiff bank. The defendants admitted the execution of the note, and pleaded tender of the amount due, with interest, attorney's fees, and costs, to the clerk. The ground for the

attachment was: "That defendant J. J. Lanin is about to convert his property into money for the purpose of placing it beyond the reach of his creditors." A writ issued on this petition, which was served by garnishing the Darrow Trust & Savings Bank and M. F. Conrad. The defendants' tender was made after the attachment was levied, but in the same pleading defendant J. J. Lanin filed a counterclaim upon the attachment bond for the wrongful suing out of the attachment, and by this pleading undertook to show that the attachment was sued out without reasonable cause for believing the allegation for the attachment to be true; and that it was sued out maliciously. The plaintiff pleaded the tender as a settlement of the matter, and also denied the allegations of the counterclaim. Upon these issues the case was tried, with the result before indicated, and the jury found specially that the attachment was both wrongfully and maliciously sued out.

The actual damages pleaded were \$25 for attorney's fees in securing the release of the attachment, and \$25 for time and trouble in securing the release of the garnishees, so that the actual damages allowed could not have exceeded \$50; the remainder of the award to defendants, to wit, \$120, being by way of punishment for the wrongful act.

The question of the rightfulness of the attachment was strenuously contested, and plaintiff claimed that in suing out the writ it acted upon the advice of an attorney before whom it placed the entire facts relating to cause for the attachment, and was advised by him that it had good cause for suing out the writ.

It is conceded that, if proved and believed by the jury, this would relieve the plaintiff from exemplary damages. With reference thereto, the trial court charged the jury as follows:

1. MALICIOUS PROSECUTION: wrongful attachment: instructions. "If you believe from the evidence that, before suing out the attachment, the officers of plaintiff submitted the facts and information possessed by them as to the financial standing of J. J. Lanin to their attorney, and that they were thereupon

advised by their counsel that they had sufficient cause for commencing an attachment suit against Lanin, then in this event you cannot allow defendant exemplary damages, but the burden of proof rests upon plaintiff to establish this defense by a preponderance of the evidence before you."

Remembering the issue tendered by the counterclaim, it will be observed that the court did not submit the question as to whether or not, after submitting the entire matter to its counsel, it was advised by him that it had good ground for commencing an attachment by reason of the fact that Lanin was about to convert his property into money for the purpose of placing it beyond the reach of his creditors. This he might have intended, no matter what his financial standing, and under the instruction the plaintiff could not be relieved from exemplary damages, although it may have placed all the facts relating to Lanin's purpose to convert his property into money for the purpose of placing it beyond his creditors, and was advised by the attorney that it had good cause for suing out the attachment on this ground. That Lanin's financial condition may have been good would not of itself be conclusive upon this subject, and that he had no financial standing would not alone indicate that he was about to convert his property into money for the purpose of placing it beyond the reach of his creditors. In other words, a false issue was raised by this instruction, and, although plaintiff may have proved that after giving all the facts of which it was possessed, regarding defendant's purposes and intent with reference to the conversion of his property into money, and was advised by counsel that it had good ground to commence an attachment suit on that ground alone, still, if it did not give him all the facts regarding Lanin's financial standing, the jury would not be justified, under this instruction, in relying upon the attorney's advice. It will be noticed, too, that it was the financial standing of Lanin, and not his financial condition, which the instruction referred to. In other words, advice of counsel with reference to suing out an attachment on the

grounds stated was made unavailing, no matter what the facts stated to counsel, unless these facts had reference to the financial standing (perhaps reputation) of Lanin at the time of the commencement of the suit.

If, then, the jury found that the plaintiff did not state all the facts relating to Lanin's financial reputation or standing, or if it, on the other hand, found that instead of that plaintiff did state all the facts with reference to the disposition Lanin was about to make of his property, to counsel, and was advised by him that grounds for attachment existed, nevertheless it could place no reliance on this advice. In this respect there was error. *McKern v. City of Albia*, 69 Iowa, 447.

II. The proof of time spent by defendant in securing the release of the attachment was very uncertain and speculative, and that matter should not have been submitted to the jury.

III. In view of a retrial, we may say that it would be better practice to show the necessity for the employment of an attorney to secure a release of the attachment, and also the value of his services. We should not reverse for failure to do this on the former trial, but suggest it now in view of the errors relied upon and the necessity for a new trial. *Waltham Piano Co. v. Freeman*, 159 Iowa, 567.

The judgment must be reversed, and the cause remanded.
—*Reversed and Remanded.*

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

WILL D. McEWEN, Adm'r, Appellant, v. H. H. FLETCHER,
GORDON FLETCHER, LILLIAN FLETCHER, WALLACE BISSELL
and INA BROOKS BISSELL, Appellees.

Administrators: REPORTS: OBJECTIONS: WAIVER OF JURY TRIAL.

1 Where an administrator includes in his report his own personal liability to the estate, and submits to a trial of the issues tendered by the objections to the report without any demand for a jury or objection to a trial to the court, he will be deemed to have waived a jury trial.

Same: DEBT DUE FROM ADMINISTRATOR: JURISDICTION. When an

2 administrator includes his own personal indebtedness to the estate in his report as a part of the assets of the estate, and asks that the amount he reports be fixed as his liability, the court has jurisdiction to determine the extent of his liability and charge it against him.

Same: ASSETS OF ESTATE. Debts due from an administrator to the

3 estate are assets of the estate from the time they become due, especially where he has mixed the funds of the estate with his own, or reports them as assets in his hands.

Same: TRIAL TO COURT: EFFECT OF FINDINGS. Where issue is formed

4 upon the report of an administrator and the objections thereto, and is tried to the court without objection, the findings of the court have the force and effect of a verdict of a jury.

Same: INDEBTEDNESS OF ADMINISTRATOR: LIABILITY OF SURETIES. So

5 far as the liability of sureties on an administrator's bond is concerned, the indebtedness of the administrator to the estate should not be regarded as an asset as of the time of its maturity, if at that time and at all subsequent times he was in fact insolvent, and did not or could not pay the same.

Same: INDEBTEDNESS OF ADMINISTRATOR: ASSETS. The administrator

6 inventoried a demand debt due from himself to the estate as a deposit in his own bank. He made no report for more than a year and then only upon order of court, in which he showed money in his bank and a personal indebtedness, but no report was ever approved. It also appeared that his bank was a going concern for

more than a year after his appointment, that he kept no separate account with the estate, and there was no evidence of his insolvency until after expiration of the year for settlement of the estate. *Held*, his debt was properly charged against him by the court as an asset of the estate, because of his greater obligation to pay that debt, as he was bound to do so as long as he was solvent.

Appeal from Pocahontas District Court.—HON. A. D. BAILIE,
Judge.

TUESDAY, MARCH 24, 1914.

THIS is a controversy over the final report of Will D. McEwen, as administrator of the estate of Hiram W. Bissell, deceased. From a finding sustaining the objections to the report and charging the administrator with the sum of \$4,731.65, which he was ordered to turn over to the Clerk of the District Court forthwith, the administrator appeals.—*Affirmed.*

J. M. Berry, for appellant.

Allen & Atkinson, for appellees.

DEEMER, J.—Hiram W. Bissell died intestate some time in July of the year 1908, and on August 29th of the same year W. D. McEwen, the appellant, was appointed his administrator, giving bond as required by law. On October 26, 1908, he filed an inventory in which he scheduled as an asset the sum of \$2,176.30, as being on deposit in what was called the City Exchange Bank of Pocahontas, of which he (McEwen) was the sole owner and proprietor, and over which he had personal supervision. One Doyle was cashier of this bank, and also kept the books. No report was made by the administrator until May 26, 1910, when one was filed showing cash on deposit in the bank in the sum of \$497.26, and admitting a personal indebtedness of \$1,900, and expenditures amounting to

\$221.15. The administrator also inventoried two hundred and fifty shares of stock in the Pocahontas Railroad & Improvement Company, one share in the Pocahontas Heat & Light Company, and one shotgun, and in his first report, filed pursuant to an order of court, he said of this property: "That he has on hand property of the said estate as follows: One certificate for 250 shares of stock in the Pocahontas Railroad & Improvement Company, the face value of which is \$6,250.00, and one shotgun, the value of which he is at this time unable to state. That the above is a full and true account of all moneys and credits of the estate of said H. W. Bissell or the property in the hands of this administrator and a true accounting of expenditures made by him."

He also scheduled a claim of his own against the estate amounting to \$65, and another claim of one Thompson, filed against the estate of Susan Bissell, deceased, upon a note signed by her and by H. W. Bissell. The only action which the record shows was taken on this report was an examination of the administrator in open court in January of the year 1911, and that seems to have been followed by an order on the administrator to make a further and final report, which he did on January 2, 1911, and this is the report to which objections were filed by four of the adult heirs of the deceased. One Atkinson was appointed guardian ad litem for two minor heirs, and he also appeared and contested the report and objected to the discharge of the administrator. The last report of the administrator showed the following:

That at the time of his appointment as such administrator, to wit, on August 29, 1908, there was on deposit in the said City Exchange Bank, a bank then privately owned by this administrator, the sum of \$497.26; said money being there to the credit of said deceased. That at the time of his appointment and prior thereto this administrator was privately owing to said Bissell the sum of \$1,893.19; said debt being due as the balance of the consideration paid for certain real estate deeded by the said Bissell to Will D. McEwen shortly

prior to the death of the said Bissell. That this administrator by virtue of his office as such has in his possession belonging to said estate personal property as follows: A certificate for 250 shares of capital stock in the Pocahontas Railroad & Improvement Company, one share of stock in the Pocahontas Heat & Light Company, and one shotgun, all of doubtful value. That this administrator has tried to dispose of said personal property, but has been as yet unable to do so or find a buyer therefor. That he has been unable to get any offers from purchasers for the said stock in the Heat & Light Company and for the said gun. That he has received some offers for the said 250 shares of stock in the Pocahontas Railroad & Improvement Company, but said offers have been for much less than the appraised value thereof as the same was fixed by the collateral inheritance tax appraisers. That no other appraisers have been appointed as yet to appraise the said personal property. This administrator believes that an appraisal of said property should be made unless the court should order that said property be sold without appraisal. This administrator further reports: That since qualifying as such and, to wit, on January 3, 1910, he made and executed to L. C. Thornton and O. P. Malcom a general deed of assignment for the benefit of the creditors; said assignment having been made for the benefit of the creditors of both the said City Exchange Bank and of Will D. McEwen. That since making said assignment this administrator has filed with said assignees a claim in favor of the estate of Hiram W. Bissell for the money due and owing by the City Exchange and himself individually to said Hiram W. Bissell and his estate. That said claim is still unpaid, but the same has been allowed by said assignees. That same constitutes one of the assets of said decedent estate. That so long as said claim is unpaid or is not settled this estate cannot be closed and a final report made. That this administrator, since being appointed as such, has changed his residence to Des Moines, Iowa, and that to attend upon the administration of this estate at so great a distance requires extra time, labor, and expense, and as said estate cannot now be closed, but must wait the adjustment of the assignment estate, he believes it to be the best interests of said estate that he be relieved from further administration duties thereof. That he believes some resident person more convenient and acceptable should be appointed to close the

administration of said estate. This administrator therefore tenders this report as a complete and accurate statement of the conditions of said estate as the same, to the best of his knowledge, can be given, and in support thereof tenders and offers an accounting by examination under oath if the same is desired. He asks: That this court may fix the manner and kind of service to be given of the hearing on this report, and that the same may be accepted as his final report in case this court shall consider his application for discharge. That upon a complete hearing the same be accepted and approved, and that he be discharged and released upon the appointment and qualification of his successor. That the court make a reasonable allowance to him for his services and for his attorney in said estate. That in case he is not relieved from further duties with reference to said estate that this report be accepted as an intermediate report, and that the court enter an order authorizing a sale of the personal property belonging to said estate, now in the administrator's hands at either public or private sale without appraisalment.

Among other objections filed to the report were the following:

That said report fails to show the true and correct amount of money in the hands of such administrator belonging to this estate. That said administrator has failed, neglected, and refused to preserve and administer the estate of the said deceased, Hiram W. Bissell, and has squandered, dissipated, and wasted the same, and the said administrator is not entitled to any compensation for what he has done as administrator of the said estate and is not entitled to payment for counsel fees or the services of an attorney. And they allege upon information and belief that the said Will D. McEwen has in his hands as the funds of said estate about the sum of \$4,731.90, also one certificate for 250 shares of stock of the Pocahontas Railroad & Improvement Company, one certificate for one share of the capital stock of the Pocahontas Heat, Light & Power Company, one shotgun, and certain books, papers, silver ware, plate ware, jewelry, and surveyor's instruments.

Upon the issues thus joined, the trial court heard the testimony offered pro and con, at the regular March, 1912,

term of the district court, neither party objecting to a trial to the court or demanding a jury, and as a result of that hearing the trial court made the following findings and order:

The report of the said administrator is not a full, true, correct, and complete report. Said administrator has failed, neglected, and refused to fully and correctly report and account for the property and funds of said estate, and has failed, neglected, and refused to administer said estate in accordance with the law and the orders of this court. The court further finds that at the date of the death of said Hiram W. Bissell said Will D. McEwen, who was thereafter appointed administrator of said estate, was the sole owner and proprietor of the City Exchange Bank. The said City Exchange Bank was not a corporation, partnership, or joint-stock company, but that the City Exchange Bank was simply a name assumed by the said McEwen under which he engaged in business as a private banker. Upon the hearing upon said report and the objections thereto, it was made to appear that the said Will D. McEwen was at the time of the death of the said Hiram W. Bissell owing and indebted to the said Bissell in the sum of \$4,953.05 for and on account of deposits with the said City Exchange Bank, which amount was then due and owing by the said Will D. McEwen and the same was then due. It further appeared that, subsequent to the death of said Hiram W. Bissell, said McEwen, prior to his appointment as administrator aforesaid, paid the following items. Undertaker's bill for casket and preparing the body of Hiram W. Bissell for shipment, the sum of \$140. Express upon the body of said decedent to Pocahontas, Iowa, for burial the sum of \$74.15. For preparing grave for the decedent, \$7.25. That after deducting the items mentioned in the last preceding paragraph, the said McEwen was owing the said estate on account of the deposits aforesaid the sum of \$4,731.65. At the time of making and filing his said report aforesaid, the said Will D. McEwen had in his hands as the property of the said estate the sum of \$4,731.65, together with one certificate for 200 shares of the capital stock of the Pocahontas Railroad & Improvement Company and a certificate for one share of the capital stock of the Pocahontas Heat, Light & Power Company and one shotgun. Said administrator, with full knowledge of the possession of said

funds as aforesaid, has commingled the same with his own, used the same in his private business, has failed to make due report thereof as such administrator, and by reason thereof should be charged with the interest thereon at the rate of 6 per cent. per annum from the 1st day of March, 1909. Therefore it is hereby ordered by the court that the said report of the said Will D. McEwen be and the same is hereby disapproved, and the said administrator is hereby charged with and held to account to said estate for the said balance so remaining in his hand, to wit, the sum of \$4,731.65, together with interest thereon at the rate of 6 per cent. per annum from March 1, 1909, and for said certificates and the said shotgun above mentioned, and the said Will D. McEwen is ordered to pay said fund forthwith into the hands of the clerk of this court for the benefit of said estate and to surrender to the clerk the other property above mentioned, and the said administrator having tendered his report and accounting to the court in probate and having invoked the jurisdiction of said court to pass upon his said report and accounting, with the result above mentioned, and the said Will D. McEwen, as administrator, having removed permanently from said Pocahontas county, and having petitioned the court to relieve him from further duties as such administrator, it is further ordered that, F. W. Linderman being a proper person to act as administrator of said estate, he is hereby named as such administrator, and upon the payment by said Will D. McEwen, administrator, of the said funds into court as aforesaid, he, the said Will D. McEwen, as administrator, shall stand discharged and his bondsmen exonerated, and upon the same being done the said Linderman may qualify as such administrator of said estate with full power and authority to receive from the clerk of said court the funds and property belonging to said estate and shall proceed to the final administration thereof, and the bond of such administrator is hereby fixed at \$10,000; and it is further ordered that the costs of this hearing shall await the final disposition of said estate.

The appeal is from these findings and orders of the court. The propositions relied upon are:

First. That the trial court had no right, on these objections, to determine the liability of the administrator upon

any personal indebtedness to the estate, for the reasons: (a) That he was entitled to a jury trial thereon; (b) that the administrator was only required to report money or property coming into his hands as such; and (c) that the individual liability of an administrator to the estate cannot be determined upon objections to his final report and accounting as administrator.

Second. That the trial court was in error in charging him with the sum it did.

I. The administrator, having made his report, which included as a part thereof his own personal liability, and having gone to trial to the court on the issues tendered by the objections, without any objection or de-

1. ADMINISTRATORS: reports: objections: waiver of jury trial. mand for a jury, must be deemed to have waived a jury trial. Code, Section 3733;

Davidson v. Wright, 46 Iowa, 383; *Henny Buggy Co. v. Patt*, 73 Iowa, 485; *Hawkins v. Rice*, 40 Iowa, 435; *Wilkins v. Treynor*, 14 Iowa, 391; *Saum v. Jones County*, 1 G. Greene, 165; *McGuire v. Kemp*, 3 G. Greene, 219; *West v. Fry*, 134 Iowa, 675.

II. Whatever might be the rule were an administrator simply to list his indebtedness to the estate, which he is to administer, and never reports the same as assets in his

2. SAME: debt due from administrator: jurisdiction. hands, we are clear that where, as in this case, he includes his indebtedness in his reports as a part of the assets of the estate, and asks

that the amount he claims be fixed as his liability, he cannot after objections are made thereto, and a finding made, that these assets are larger than he claims, be heard to say that the trial court had no power to adjudicate the matters or to do more than find the amount of the claim, leaving the matter of its collection to the will of the administrator. When he introduces the matter into his report as an asset and so treats it, he invites the jurisdiction of the court, and a finding as to the amount with which he should be charged on account of that indebtedness. Such appears to be the uni-

versal holding of the courts. *Savery v. Sypher*, 39 Iowa, 675; *Duffield v. Walden*, 102 Iowa, 676; *Hodge v. Hodge*, 90 Me. 505 (38 Atl. 535, 40 L. R. A. 33, 60 Am. St. Rep. 285), and valuable note collecting cases. Compare *Kaster v. Pierson*, 27 Iowa, 90.

There is no provision of law for the appointment of a special or temporary administrator to collect a claim due from the regular administrator to the estate; neither the heirs, creditors, distributees, or legatees may maintain an action to recover such indebtedness from the regular administrator; and, of course, the administrator cannot sue himself. *Winship v. Bass*, 12 Mass. 199; *Bigelow v. Bigelow*, 4 Ohio, 147 (19 Am. Dec. 591); *Savery v. Sypher*, *supra*.

For every purpose save one, to which we shall presently advert, debts due by an administrator to the estate he is administering are treated as assets of the estate from the time of their maturity, especially where he has mixed the funds of the estate with his private property, or reports them as assets in his hands. *Savery v. Sypher*, *supra*; *Shields v. O'Dell*, 27 Ohio St. 398; *Baucus v. Stover*, 89 N. Y. 1.

We have no doubt of the power of the court, on any theory which may be adopted, to ascertain the amount of the indebtedness due from the administrator himself to the estate he represents, when he himself brings that into the case and asks the court to find the amount and order his discharge.

III. The matter was in probate and tried to the court without objection, upon the issues joined, and the testimony adduced and the court's finding on disputed questions of fact has the same force and effect as the verdict of a jury. Even considering the testimony of McEwen himself as competent, which we do only for the purposes of this discussion, we are satisfied with the finding of the trial court as to the amount of McEwen's indebtedness.

IV. The real nub of this controversy arises out of that

3. SAME: assets
of estate.

4. SAME: trial to
court: effect of
findings.

part of the report, wherein the administrator pleads his insolvency or rather his assignment for the benefit of creditors,

on January 3, 1910, something like sixteen months after his appointment as administrator, and his filing a claim with his assignee for the amount of his individual indebted-

5. **SAME:** indebtedness of administrator: liability of sureties.

ness. These facts make a rather interesting case in which, of course, the administrator's bondsmen are primarily interested, although not parties save by representation. The matter is fully argued regarding the liability of the administrator, and whether or not he should be charged as such because of the amount of his indebtedness to Bissell before his death. Whatever the amount, it was due on demand, on Bissell's death, and represented an amount of money owing to Bissell as a balance of the purchase price of certain realty, purchased from Bissell shortly before his death.

For general purposes this must be treated as part of the assets of the estate, and it will be so treated, unless it appears that at the time of his appointment McEwen was insolvent and had no assets or property which could be used for this purpose. Many courts hold that the amount of the indebtedness of the administrator will be treated as assets in his hands belonging to the estate, from the time of its maturity, be he solvent or insolvent; thus making the sureties on his bond guarantors of his personal indebtedness, and becoming immediately liable for the amount of the indebtedness because of the administrator's insolvency. See, as sustaining this view, the cases already cited from other states, and *Arnold v. Arnold*, 124 Ala. 550 (27 South, 465, 82 Am. St. Rep. 199); *Bassett v. Fidelity Co.*, 184 Mass. 210 (68 N. E. 205, 100 Am. St. Rep. 552); *Tarbell v. Jewett*, 129 Mass. 457; *Crow v. Conant*, 90 Mich. 247 (51 N. W. 450, 30 Am. St. Rep. 427); *McGaughey v. Jacoby*, 54 Ohio St. 487 (44 N. E. 231); *Beall v. Hilliary*, 1 Md. 186 (54 Am. Dec. 649); *Davenport v. Richards*, 16 Conn. 310; *Jacobs v. Morrow*, 21 Neb. 233 (31 N. W. 739); and cases cited in note to

United Brethren Church v. Akin et al., 2 Ann. Cas. 353 et seq. (s. c., 45 Or. 247, 77 Pac. 748, 66 L. R. A. 654).

The better rule, we think, is that, for the purpose of charging the sureties on the administrator's bond, the indebtedness owing by the administrator to the estate should not be regarded as an asset as of the time of its maturity, if at that time and at all subsequent periods he was insolvent and did not have, or could not procure the money. Whilst some of the courts have been inconsistent on this proposition, the following cases seem to hold the doctrine last above announced: *Walker's Estate*, 125 Cal. 242 (57 Pac. 991, 73 Am. St. Rep. 40); *State v. Gregory*, 119 Ind. 503 (22 N. E. 1); *Buckel v. Smith* (Ky.) 82 S. W. 235, 1001; *Potter v. Titcomb*, 7 Me. (7 Greenl.) 302; *Linthicum v. Polk*, 93 Md. 84 (48 Atl. 842); Compare *Lambrecht v. State*, 57 Md. 240; *Sanders v. Dodge*, 140 Mich. 236 (103 N. W. 597, 112 Am. St. Rep. 399); *McCarty v. Frazer*, 62 Mo. 263; *Howell v. Anderson*, 66 Neb. 575 (92 N. W. 760, 61 L. R. A. 313); *Harker v. Irick*, 10 N. J. Eq. 269; *Baucus v. Barr*, 45 Hun. (N. Y.) 582 (affirmed in 107 N. Y. 624, 13 N. E. 939); *Matter of Piper*, 15 Pa. 533; *Rader v. Yeargin*, 85 Tenn. 486 (3 S. W. 178); *Lyon v. Osgood*, 58 Vt. 707 (7 Atl. 5); *Sanchez v. Forster*, 133 Cal. 614 (65 Pac. 1077).

While the sureties on an administrator's bond do not guarantee his solvency or ability to pay his own debt to the estate, yet as he holds the matter in his own hands and at the time of the maturity of his debt, or afterward, becomes solvent, he is expected to do his duty and to set apart for the estate of which he is trustee, the amount of his indebtedness. *Condit v. Winslow*, 106 Ind. 142 (5 N. E. 751); *Matter of Piper*, *supra*; *Rader v. Yeargin*, *supra*; *Probate Court v. Merriam*, 8 Vt. 234.

In *Gay v. Grant*, 101 N. C. 206 (8 S. E. 99, 106), it was held that the sureties were liable where the administrator was able to pay his debt, but was insolvent in that his property was not subject to legal process.

This whole matter was thoroughly considered in *In re Howell*, 66 Neb. 575 (92 N. W. 760, 61 L. R. A. 313), and with the report of the case in the latter volume is printed a learned opinion by the trial judge. This opinion adopts the rule of the Indiana and other courts, which is as follows:

‘One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T. Miller, the administrator, during the period of his administration. The money collected by him while professing to act as agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust, which he should have inventoried and charged himself with; and if, by the use of due diligence, all or any part of the claim could have been saved to the estate, his sureties are therewith chargeable; but, if he was hopelessly insolvent, they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties.’ Further on in the opinion the court says: ‘The debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of his administration in discharge of his official liability’—citing *Woerner*, Am. Law of Administration, page 654, section 311; *Griffith v. Chew*, 8 Serg. & R. (Pa.) 17 (11 Am. Dec. 556); *Eichelberger v. Morris*, 6 Watts, 42; *Tarbell v. Jewett*, 129 Mass. 457; *McCarty v. Frazer*, 62 Mo. 263. . . . It is a well-established rule of law, running back even before the Revolution, that an executor or administrator is considered as having paid the debts due from him to the estate, and as actually having in his possession that much more cash. If the personal representative is insolvent, the courts, in the interests of all concerned, modify this rule somewhat. He still charges himself with the amount of his debt, but it does not make it actually money. The law does not require impossibilities, and there is no more reason why he should be considered as having paid what he was utterly unable to pay, than any other creditor. He is held liable to the estate to the extent of his ability to pay the same at any time during administration.

This appears to us to be the reasonable rule, and it was foreshadowed in *Kaster v. Pierson*, 27 Iowa, 90-95, although

what is there said is perhaps dictum. We adopt the rule of the Indiana and Nebraska courts, and as stated by some of the text-writers, as the logical and reasonable one. Applying it to the facts in this case, it will be observed that the debt from the administrator was due on demand, and it was his duty to pay or account for it if he were able, upon his appointment as administrator. As a matter of fact he inventoried the claim as a deposit in his bank on October 26, 1908. He did not report within a year, as was his duty, and did nothing in this regard until ordered by the court to act, and then filed a report showing money in his bank and a personal indebtedness to the estate on May 26, 1910. This report was not approved, and no report made by him has ever secured an approval by the court.

Without keeping any separate funds in his bank for the estate, he continued to conduct his bank in the usual manner, so far as shown, down to the time he made his assignment for the benefit of creditors, in January of the year 1910, something like sixteen months after his appointment as administrator. Until that assignment was made, his bank was a going concern, and there is no proof of his insolvency before that time. By reason of his trusteeship, he was under greater obligations to pay this debt than any other which was not of the same character, or to set aside enough of his funds to do so. This he did not do, but on the contrary mingled all the funds in his bank, and made no charge even against himself as a debtor, to the estate, or in any other manner segregated the funds. So long as his bank was a going concern, it was, as we think, his duty to do this, and he was not relieved because of the fact that it might make him insolvent.

Surely within the year for paying claims he should have given himself credit for the amount of his indebtedness to the estate, just the same as it was his duty to collect any other debt due from a third person. If to his knowledge such a third person was running behind and likely to become in-

solvent, he would be held to a speedy collection of the claim before that calamity would happen. So in his own case, he knew, of course, of his failing condition, and as a representative of the estate it was his duty to act upon this knowledge and save this amount to the estate before protecting ordinary creditors. Upon this last proposition we have given the administrator the benefit of every doubt, and assumed in his favor that certain statements made only in briefs of counsel are correct, and as a result we are of opinion that the findings and orders of the trial court are correct, and that the settlement made with the administrator is binding.

The orders and judgment are, therefore—*Affirmed*.

LADD, C. J. and GAYNOR and WITHROW, JJ., concurring.

ALBERT J. SNIPPS, Appellee, v. MINNEAPOLIS & ST. LOUIS
RAILROAD COMPANY, Appellant.

Negligence: EVIDENCE OF GENERAL CUSTOM. Where plaintiff alleged in
1 an action for injuries caused by an explosion of gasoline which
escaped from defendant's pumping engine, that it was the custom
for shippers of stock to start the engine and to go into the pit
to prime the pump with water, evidence that shippers other than
plaintiff had been in the habit of starting the engine and thus
priming the pump, was admissible for the purpose of showing an in-
vitation and general custom of so doing.

Same: EVIDENCE. Evidence that the foreman of defendant's water
2 supply had been instructed to permit no one except employees of
the defendant to enter the pump house was properly rejected, where
it appeared that shippers of stock were generally allowed to pump
water for their stock, and it did not appear that plaintiff knew of
the order.

Same: INJURY TO INVITEE. Where the evidence tended to show an
3 invitation to shippers of stock to enter the pump house and operate
defendant's engine and pump for the purpose of watering their
stock in defendant's yards, the defendant was required to use
reasonable care to maintain its pump and engine in a reasonably
safe condition for use.

Same: PROXIMATE CAUSE: EVIDENCE. Where the evidence tended to
4 show that it was the custom of shippers to use defendant's pump for watering stock, and in doing so it was necessary to go into a pit to prime the pump, using a light, and an explosion of gas occurred as the result of a leakage of gasoline from the engine above, resulting in injury to plaintiff, which conditions were known or in the exercise of reasonable care should have been known to defendant in time to have remedied the same, the dangerous condition of the engine and pump was the proximate cause of the injury. Evidence held to require submission of the issue of proximate cause to the jury.

Same: REPAIR OF DEFECTS: INSTRUCTION. An instruction in this case
5 that if defendant had notice, either actual or constructive, of the defects complained of and failed to repair the same it would be chargeable with negligence, was fundamentally erroneous in failing to state such notice must have been for such length of time that defendant, in the exercise of reasonable care, might have repaired the defects before the injury occurred. Independent of any request or failure to request an instruction upon that point it was the duty of the court to give it.

Same: INSTRUCTIONS: ASSUMPTION OF FACTS. The instruction in this
6 case, which assumed the right of defendant to be at the place where he was injured, a fact which was in dispute, was erroneous for that reason.

Appeal from Winnebago District Court.—HON. M. F. EDWARDS, Judge.

TUESDAY, MARCH 24, 1914.

ACTION to recover damages for injury resulting from the explosion of gas in a pit adjacent to and a part of a pumping plant of the defendant. From a verdict and judgment for plaintiff, the defendant appeals.—*Reversed.*

Price & Joyce, for appellant.

Oliver Gorden and Morgan & Meighen, for appellee.

WITHROW, J.—I. Plaintiff's cause of action is based upon injuries received by him from a gasoline explosion in defend-

ant's pumping station connected with its stockyards in Forest City, Iowa. He pleads: That the defendant maintained its pumping plant at its stockyards for use by anyone shipping stock on its line of railroad, and for the purpose of supplying water for stock while in its yards. That at and prior to June 23, 1911, the day of plaintiff's accident, it had been the custom and practice of the defendant to permit and require stock shippers who had stock in its yards to start and operate the gasoline engine and pump when water was needed by them, and it was the custom and practice of defendant's agent to give to stock shippers using water the key to the house in which the pump and engine were situated, and to direct them to start the engine and pump, and it was also the custom to permit shippers to enter the pumphouse without a key whenever the door was unlocked. That on and for a long time prior to June 23, 1911, the defendant negligently permitted the pump to become defective and out of order, and it could not be started without being primed, to do which it was necessary to go down into the pit, near the pumphouse, and, the pit being deep and dark, it was necessary to have a light by which to see to prime the pump. That prior to said date the defendant negligently permitted the gas tank and engine to become leaky, causing the gas to run out into the pit. That the defendant had notice and knowledge of such dangerous condition. As the cause of his injuries, the plaintiff claims that, having occasion to water his stock there in the yard, at the invitation of the defendant he went into the pumphouse to start the engine, but it did not draw water, and that to prime the pump he went into the pit, and to aid him in seeing lit a match, following and as a result of which there was an explosion of the escaped gas, causing to him the injuries for which he claims damages. The defendant answers by general denial, and pleads contributory negligence of the plaintiff. The jury returned a verdict for the plaintiff, and, from the judgment entered upon it, this appeal is taken.

II. The evidence introduced on the part of the plaintiff tended to show that it was the custom and practice of the agent of the defendant to, upon request, either unlock the pumphouse or give the key to the shipper, that water might be had for stock in the yards for the purpose of shipment. The plaintiff testified that the defendant's agent had previously showed him how to put on the spark and give gas to the engine. Other witnesses testified that for a considerable time previous to the accident the pump had required priming, and that the agent had at first corrected the trouble, but later permitted them to do so when they needed water. By others it was testified that they had noticed the smell of gasoline in the pumphouse, and this quite frequently and for a considerable time before June 23d, and on that day. The station agent testified that he did not grant permission to patrons to start the engine and pump; that he permitted no one to run the machinery.

The plaintiff testified that at the time in question there were in the yards a number of head of range horses shipped in by him the day before, and kept in the yards for the purpose of sale, there being on the day of his injury a number of possible buyers present. The evidence tends to show that the privilege of thus keeping stock in the yards for a reasonable time after delivery for the purpose of sale had been granted by the railroad company to the plaintiff, and had been by him so used at different times; but nothing was paid for rent or water. Further statement of the evidence is not required to determine the questions raised by the assignment of errors.

III. A witness, one Will Lumberg, was permitted to testify, over the objections of the appellant, that he was once down in the pit with the agent to prime the pump, and at other times alone for the same purpose.

1. NEGLIGENCE:
evidence of gen-
eral custom.

It is claimed that the evidence was incompetent to seek to establish an invitation to plaintiff. Testimony of like nature was given by John Lumberg,

to which exception was taken. To it the objection was made that it did not tend to show an invitation or permission to others than the witness. The claim in the petition was that it was the custom and practice to permit shippers to so do. These witnesses were within that class, and, while evidence as to a special permission to them would not of itself establish a custom as to shippers generally, it was competent as bearing upon the ultimate question of custom, for, while a general custom must be shown by facts which disclose that it is observed generally by the class who follow it, this necessarily is made up of individual instances, which when combined show its general recognition.

There was no error in admitting the testimony.

IV. A witness, M. D. Colt, presented by the defendant, testified that he was foreman of the water supply of the railroad company, that he had received instructions as to who should be allowed to go into this pumphouse, and that no one other than an employee or some one under his direct supervision should be permitted to enter it. Upon motion the answer was stricken out as immaterial, and exception was taken. Other witnesses were offered on the same question. The theory upon which the evidence was offered was that the company did not know that the use of the pumphouse by others than the agent had been permitted, and that, if such was done, the agent acted beyond the scope of his authority. It appearing that the agent had charge of the buildings and yards of the company, any prohibition of its use for purposes incidental to the business of the company would not be binding upon persons permitted by the agent to so use it, without knowledge of such prohibition. See 1 Thompson on Negligence, 530; *Croft v. Railway Co.*, 132 Iowa, 695. As there was no evidence tending to show knowledge by plaintiff of a withdrawal of the permission which the evidence tends to show had been granted, the offered evidence was immaterial.

2. SAME: evidence.

V. It is urged by the appellant that under the facts

there was shown to have been no duty from it to the appellee, and, without such duty, there could be no negligence. This position is based upon the thought that he
3. **SAME: injury to invitee.** was at most a licensee entering by permission only, under which conditions the owner cannot be held liable for inherent defects in the premises, and that such a licensee goes at his own risk, and subject to all perils incident to the place. The evidence in the case tended to show that there was an implied if not an express invitation to shippers to pursue the course followed by the appellee at the time of his injury, in providing water for the stock. That which was being done by him was for a purpose connected with the business in which he was then engaged—the care and disposition of his horses which had been permitted by the appellant to be kept in the yards for sale after delivery. Assuming such to be the facts, and the evidence tends to so show, the appellee was rightfully there, attempting to do that which was necessary and proper in the care of his horses, and which was usually and customarily done by shippers or occupants of the yards, with knowledge of such custom by the appellant through its agent. Under such facts there arose a duty upon the part of the appellant to exercise ordinary care to keep the property so used in a reasonably safe condition. *Croft v. Railway Co., supra; Thomas v. Railway Co., 103 Iowa, 654; Clampit v. Railway Co., 84 Iowa, 71; 3 Elliott on Railroads, Section 1249; 1 Thompson on Negligence, Section 968.*

It is claimed by appellant that, if the facts were such as to require submission to the jury upon the question of the permission to use the pumphouse, such did not extend to the pit where appellee received his injury. We think this position cannot be upheld. If there was the right to use the pump, and if, as the evidence tends to show, there had been the further recognized right and permission to go into the pit for the purpose of priming the pump, then the duty as to exercising ordinary care would extend to that situation,

as it was connected with and under the circumstances, a necessary part of that needed to be done to supply the horses with water.

VI. With this conclusion as to the duty of appellant, and of the degree of care required under such conditions, we then consider the errors urged as to instructions given by the trial court. Instruction No. 3 was

4. SAME: proximate cause: evidence. a statement of what the plaintiff was required to prove to entitle him to recover. The various subdivisions of the instructions stated the different necessary elements to the required total proof, all of which, excepting divisions 8 and 9, as to their correctness coming within the conclusions we have stated in the foregoing divisions of this opinion. Objection is made to subdivision 8, for the reason that it submitted the question of negligence in permitting the pump to become defective and out of order, requiring priming, and in permitting the gas tank and pipes to leak, making the pit dangerous and liable to cause an explosion. The criticism is that the condition of the pump was not a proximate or contributory cause to the injury, and that there was no evidence to support the submission as to the leaky condition of the tank and pipes. As to the first ground it may be said that, if the priming of the pump was a necessary part of the work in getting water, and if to do such it was necessary to enter the pit and use a light, and if the presence of gas in the pit occasioned danger, and if these conditions were known to the appellant, or in the exercise of reasonable care should have been known, in time to have repaired or remedied them, there was then such connection between cause and effect, that natural and continuous sequence without an intervening cause, that would properly designate the alleged dangerous condition of the pit as the proximate cause. 32 Cyc. 745.

This court, in *Liming v. Ill. Cent. Ry. Co.*, 81 Iowa, 246, quotes with approval the rule as follows: "A person guilty of negligence should be held responsible for all the conse-

quences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow, if they had been suggested to his mind." Measured by this reasonable test, there was no error in submitting to the jury that feature of the case, for it would naturally come to the ordinary mind that, from a condition of escaping gas surrounding a pump requiring priming, with artificial light necessary to do the work, the combination of the two elements danger would arise, and disaster probably follow. This, of course, does not take into consideration the duty of the appellee under such conditions, such arising under the plea of contributory negligence, and which was properly submitted to the jury. As to the latter ground of objection, the proof made it, also, a question for the jury.

VII. The objection to subdivision No. 9 of instruction No. 3, raises the same question presented in the objection to instruction No. 8, which as given was as follows: "You

are instructed that, if the defendant, through
5. SAME: repair of defects: instruction. its agent, servant or employees, whose duty it was to look after and see to said pumping station, gasoline engine, pump, and connections, in charge for the use for which the same were erected and used, had actual or implied notice of the defects in the same, or might, in the exercise of reasonable diligence, have known of said defects, if any you find, before the injury complained of occurred, and on such notice, if any, failed to repair the same, then and in that case the defendant is liable and chargeable with negligence."

The instruction in defining the duty of the appellant required notice, either actual or implied, of the defects which are alleged to have caused the accident as an element in finding negligence. It is faulty, in that it fails to state that which always is necessary as a full statement of the law upon

that proposition, that the notice, whether express or implied, should have been in such time that the defendant, in the exercise of ordinary care, could have repaired it before the injury. *Escher v. Carroll County*, 159 Iowa, 627; *Connolly v. Des Moines*, 130 Iowa, 633.

The plaintiff's case was brought upon the theory that such notice was necessary; that being pleaded as a separate paragraph in the petition. It was, as we conclude, the only theory upon which the case could be presented, as the appellant was held only to the exercise of reasonable care in avoiding the possible danger to those who might so use the premises under the custom; and this degree of care did not make it the insurer of the safety of those who should thus go on the property. The appellee claims, however, that, as the appellant requested no instruction upon that point, and the court having instructed generally upon the issues and the different phases of the case, that complaint cannot now be made of a failure to so instruct. But the question of notice and reasonable time to correct the condition was a part of the law of the case necessary to the right of recovery, which the jury was entitled to have, and which the parties had the right to expect would be given; and independent of request, or failure to request an instruction upon that point, it was the duty of the trial court to give it. As given the instruction required a less degree of proof than the law fixes as necessary, and was, therefore, erroneous. *Overhouser v. Am. Cereal Co.*, 128 Iowa, 586; *Upton v. Paxton*, 72 Iowa, 299; *Seekel v. Norman*, 71 Iowa, 264; *Owen v. Owen*, 22 Iowa, 270.

It is not within the rule relied upon by appellee, and in support of which many of our cases are cited, to the effect that, when an instruction given is correct so far as it goes, failure to give more specific instructions will not be error, unless they have been requested. There is an omission to include within the rule as claimed by appellee the vital provision that the court must have given to the jury a correct statement of the law, which means the governing rules of the

particular case; and, for want of detail in expression or application to particular phases of the evidence, to ground error there must have been a request for such additional instruction.

VIII. Instruction No. 4, as given by the trial court, was in part as follows: "It was the duty of the defendant to use ordinary care to keep said pump in repair and working order, and said engine and gas tank and pipes connected therewith from becoming leaky, and said pump pit from becoming dangerous, so as to avoid injury to plaintiff at and before the time of the injuries sued upon herein. If said defendant exercised ordinary care as here stated, the defendant was not negligent."

6. SAME: instructions: assumption of facts.

The balance of the instruction did not bear upon this paragraph by way of enlargement or limitation. We have earlier referred to the elementary rule that there can be no liability without primary duty, and this is followed by the further rule that duty on the part of one does not exist as to all, but only as to such as may, by reason of relations, invitation, permission, or other circumstances, be entitled to its observance as an element entering into their rights. There was dispute in the facts as to right of appellee to have been at the place where he was injured; without such right, there was due him no duty. The instruction, by its terms, necessarily assumed facts which showed his right to be there; otherwise the rule as given as to duty would not be applicable as broadly stated. It should have been qualified and made to depend upon the finding of necessary facts by the jury. We think that as given it was wrong.

IX. What we have said sufficiently indicates our views upon the questions raised as to the refusal of the trial court to direct a verdict because of the insufficiency of the evidence to show liability under the facts. Such was for the jury; but because of the errors found the judgment of the trial court is—*Reversed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concurring.

W. J. ALLGOOD, Appellee, v. A. E. FAHRNEY, Appellant.

Brokers: ACTION FOR COMMISSION: EVIDENCE. In this action for a
1 broker's compensation the evidence is reviewed and held to support a finding that defendant engaged plaintiff to make an exchange of his farm, that he produced a party with whom an oral contract of exchange was made, ready, able and willing to perform, no objection being then made by defendant to an existing mineral lease.

Same: REFORMATION OF CONTRACTS: JURISDICTION. Equity will not
2 reform a parol contract: it is only where it has been reduced to writing and the real agreement of the parties is not correctly expressed therein that equitable jurisdiction may be invoked for this purpose. Thus a suit upon a parol contract by a broker to make an exchange of lands will not be transferred to equity on the theory that it should be reformed.

Same: RECOVERY OF COMMISSION: STATUTE OF FRAUDS. Where a broker
3 was authorized to procure one who was ready, able and willing to make an exchange for the land of his principal on terms acceptable to him, and such a person was procured with whom an oral contract of exchange was entered into, the broker is entitled to his commission, and his right thereto cannot be defeated by the subsequent refusal of his principal to proceed and reduce the contract to writing.

Same: RECOVERY OF COMMISSION. Upon refusal of the owner to carry
4 out his oral contract of exchange, a sale or exchange by the other party of his land will not affect the right of the broker to his commission; he is not bound to keep the other party in readiness at all times to make the exchange.

Practice: SPECIAL INTERROGATORIES. Where plaintiff's right of recovery depends upon the existence of many facts, each having relation to the other and constituting the facts upon which the final conclusion rests, refusal to submit special interrogatories as to whether plaintiff had established the truth of every matter alleged was proper.

Appeal from Mahaska District Court.—HON. HENRY SILWOLD,
Judge.

TUESDAY, MARCH 24, 1914.

ACTION to recover commission for the sale of real estate.
—*Affirmed.*

W. H. Keating, for appellant.

Reynolds & Davis, for appellee.

GAYNOR, J.—It appears that the defendant was the owner of certain property in the city of Oskaloosa; that the plaintiff was engaged in the real estate business; that some time during the month of May, 1912, the defendant listed his Oskaloosa property with the plaintiff, under an agreement between them that, if the plaintiff would procure some one who would purchase defendant's property or would exchange other property for defendant's property, on terms satisfactory to the defendant, the defendant would pay the plaintiff a commission therefor; that plaintiff found one Peppers, who owned a farm in Monroe county consisting of 210 acres; that the plaintiff took the defendant down to look at that farm; that the defendant did go down and look at the farm, in company with the plaintiff; that at the time the plaintiff told the defendant that there was a mineral right or coal lease on the land in Monroe county; that, after the defendant had looked the land over, he told the plaintiff that he wanted his wife to see it before anything was done; that the defendant looked the land over at that time, and expressed himself as satisfied with it, but returned to his home without making any contract with Peppers for the purchase of the land; that thereafter he was taken sick, and was sick for some time; that in the month of September following plaintiff again approached the defendant for the purpose of making a trade

with Peppers for the land in Monroe county, and took the defendant and his wife down and showed them the land. There is no controversy in the case as to the amount which defendant was to receive for his property in exchange, and the amount that Peppers was to receive for his land. Defendant placed his property at \$20,000. The price of Peppers' farm was fixed at \$31,500, leaving a difference of \$11,500 to be paid by the defendant to Peppers on the exchange.

On the trial plaintiff testified, substantially, as follows:

Defendant said to me: 'If I sell, I would buy a farm; so I might as well trade for it. I have been looking at different farms, but found nothing that suited me.' I told him I thought I might get him a trade for the Peppers farm. I gave him a description of the place, told him I would see if Peppers would trade, and, if he would, I would let him know. So I called Peppers up over the phone, told what it was, where it was, and that he (Peppers) knew the place; and he said he would consider a trade. I told Fahrney that Peppers would trade. I also told him: 'There is a mineral right against that farm, but it has been sunk on and dug, and has been abandoned.' I knew the place over in there for about thirteen years. I and him went to Eddyville on the train, took a livery team, and drove out to Peppers', looked the farm over, and I asked him what he thought of it. He says: 'It is lots better than I expected, and better than you represented it.' I showed him where the shafts was, and told him this mineral right was there. Mr. Peppers told him the mineral right was there, and showed him where it had been dug out, and where the shafts was situated on the place, the piles of slack, and where the tram road was. We talked trade. Mr. Fahrney wanted his wife to see the place, but she wasn't able to go, and, as his wife wasn't able to go, the matter kept hanging. And Peppers says: 'I don't believe there is any use to wait on that Fahrney deal; I will just call it all off.' I told Mr. Fahrney that the deal was called off; this was the middle of May. Along in September I was down past Fahrney's feed yard, and he says, 'My wife is able to go and see the farm,' and I said, 'If you want to trade the way we talked of when we was over there, the price, and Peppers will trade.' I says, 'I will let you know.' So I . . .

went to the telephone, and called Mr. Peppers up, and talked to him over the phone, and told him the reason Mr. Fahrney couldn't do anything before was on account of his wife's health. Mr. Peppers said, 'I will give him one more trial.' We went over in an automobile, Mr. Fahrney, his wife, and I, with Mr. Spavin, from Oskaloosa. When we arrived at the farm, Mr. Fahrney says: 'The farm looks better to me than at first.' Then we took the wife in the automobile, and we went down the road where she could see all over the place, and we talked there, he and his wife between themselves (we was all in the automobile); and Mr. Spavin said for them to sit in the automobile, and Peppers, I, and Spavin left them sitting there, and we went away. Later Mr. Fahrney (defendant) called me to one side and asked if I expected a commission, and I said, 'If you are not going to pay me a commission, this deal will never go through.' I said, 'That is what I am working for;' and then he says, 'I will tell you; I cannot trade the way Peppers wants to trade.' The way the trade was to have been first, when we talked at the automobile, Peppers was to get possession of the feed yard, the 1st of October, and he was to keep all of the crop, and Mr. Fahrney to take possession of the farm the 1st of October, with the exception of the crop that was on it. Mr. Fahrney says to me, 'I cannot do that;' he says, 'I will give him the feed yard, and he would get profit on that, and I would have to take the farm, and get nothing out of it until I raised a crop;' and he says, 'I couldn't do that.' I talked with Peppers, and the latter agreed to give Fahrney one-half of the ninety acres of hay, which was bound in the field, when it was threshed, and one-half of the sixty acres of corn on the place, the land being farmed by a tenant, and there being 90 acres of hay being cut and bound, and 60 acres in corn, which Mr. Peppers was to receive from the tenant, one-half of each. I told Fahrney what Mr. Peppers would do, and he says: 'That changes things; that is all right.' We went to the house for dinner, which was not quite ready, and Mr. Fahrney asked for a measure to measure the rooms for sizes of carpets, and talked about buying the carpet on the stairs, and a large range stove. I wanted to go to Albia that afternoon and draw up the contract, and he says, 'Well I will tell you; I have got nobody left at the yard but a little boy;' and he says, 'I never made any arrangement for his dinner.' He says, 'I want to get back just as soon

as I can;' and he says, 'You come over in the morning, and we will draw up this contract.' Mr. Peppers came the next morning on the 7 o'clock train, and we went to the feed yard, spoke to Fahrney, told him we were ready to draw up a contract, and he says, 'While sitting here last night at 10 o'clock it came to me, if I wanted to sell that place, the mineral right would be a hindrance.' So we left him, and we went back several times. Fahrney's only kick was the mineral right.

Peppers, called as a witness for the plaintiff, testified substantially the same as the plaintiff, touching what was done and said regarding the trade, and further testified that all the terms of the exchange were agreed upon between him and the defendant, and that, when the defendant left after dinner, he said to Peppers, "You will be over tomorrow morning and draw up the contract as we have agreed upon for this farm," and I says, "Yes." I came over to draw the contract, and he said that he thought during the night that the mineral right might hinder him in disposing of the land. I was, at the time, ready, able, and willing to carry out my part of the contract."

He further testified that the trade was made there on the farm; that the defendant did not ask for longer time to consider the matter; that all was agreed upon except reducing it to writing, and it was agreed that that should be done the next morning; that they were to furnish abstracts, but that the defendant was to take it subject to the coal lease; that he was to accept the land subject to the coal lease; he was to accept the land with the coal lease on it. "The first time he came there I told him of the lease, and he saw a copy of it. While he was there on the farm, after he had inspected it, the defendant said he would take the place, and I said: 'We will go to Albia and draw up the contract.' I said: 'We ought to draw the contract specifying what the trade amounted to.' He said: 'Come to Oskaloosa in the morning and we will draw up a contract. Everything is satisfactory that we have agreed upon.'"

The defendant, testifying for himself, testified:

I know Mr. Allgood who came to me about the middle of May, 1912. I was working in my barn putting in a screen door. He told me about a farm in Monroe county. We talked about exchange, and I told him I would go and see the farm. He mentioned a coal or mineral lease of some kind, and I never lived in a mineral district, and I didn't think much about it. I didn't know anything about it, as I lived in Northern Iowa, and they didn't have coal mines there. He explained to me that there was nothing that would hinder, as the coal was all mined out, and he took quite a little time explaining to me that it wouldn't interfere with anything, the coal being all mined out, before we ever went to see the farm, and I asked the question whether that would hinder giving a clear title. We used the word 'clear title'; didn't use the word 'merchantable title'; I was to furnish him a clear title to my property. A clear title we talked; didn't use the word 'merchantable title.' We were to furnish clear titles to them. And he explained that to me at the time—very satisfactory at the time—that the coal lease was nothing that would interfere. So we went to see the farm. The farm is practically the same as stated by Mr. Allgood. I went and looked the farm over, everything looked good. I asked Mr. Peppers, 'How about this coal business?' and he did explain it to me very satisfactory that it was nothing that should interfere in any way whatever, because it was all mined out; and I took their word for it that it was. Then nothing more was done until September, 1912, when Mr. Allgood came to my place. He had come several times, and he thought we might get the deal through for Peppers' farm, and he telephoned and said for my wife and I to come down; so my wife and I, with Allgood, went to the farm in an automobile. At this time absolutely nothing was mentioned about the coal lease, because I hadn't thought anything about it from the time of the first deal until after I got home in the evening, when the thing came up to me about the title. That question came to my mind, and in the morning, when Peppers and Allgood came to go into the contract, I said, 'Boys, now I got to studying about that this would be a clear title; whether there was a clear title to this.' I argued that it would be a blemish to the

sale of the property; and they argued that it would not. Anyhow, that was the argument. Finally Mr. Peppers apparently got a little out of humor, and I says, at any rate, I asked him the question whether that could be released in any way off of the farm. Well, we were arguing the case whether that would be considered a clear title. We didn't use the word 'merchantable title'; but we did use the word 'clear title.' I was to furnish a clear title. So were they. That was the first deal we talked. The question then was whether that actually done so, and that brought up the question that morning. There was nobody open yet to go to get a contract, as far as that goes, because possibly it was only about 8 o'clock in the morning. I argues that that would not be a clear title, that I couldn't sell the farm with that on it; and they argued, I couldn't say just how, but, any rate, we had an argument there. They told me there was a coal lease there, but, of course, they explained it to me satisfactory at the time that it wasn't no harm to anything, and that, of course, settled it in my mind that wasn't going to be any hindrance to a clear title. So that morning, when we went to see the farm, we went ahead and supposed the deal was all through, until I brought up that question. Now, I never refused to go on with the deal; never refused to. I stood ready all of the time, willing and anxious to make the deal. I was well pleased with the farm. My wife was well pleased with the house. We wanted to make the deal, and was ready there to make the deal, and I simply raised the question there that morning, before we could go any place to make a contract. Thereupon Peppers said: 'If you don't take it that way, some one else will.' They went away and left me. I supposed it was settled then. Along about 9 o'clock plaintiff came back. He commenced talking about drawing the conveyance; that the lease wouldn't be any hindrance. But I shook my head. I couldn't see how that could be considered a clear title. Thereupon, upon his request, we went to an abstractor and submitted the question. We asked the abstractor whether it would be considered a clear title with that lease. I was giving an abstract to show clear title. So were they. I asked the abstractor the question. He said it would not be a clear title with the lease; that there would likely be some expense to removing it. It might not be much as the coal was all worked out. It might cost nothing. I didn't change my mind about the trade.

The morning they came to me I raised the question about the lease, whether that was a clear title.

Then this question was asked him:

Q. Then, as I understand you, you wanted to tell the jury that you knew from the beginning that there was a coal lease on the land? They explained it to you; that you had a couple of months to study over it; and that about 11 o'clock, after the bargain had been made, you thought that the title might not be a clear one, and that that spoiled the trade, and that is the basis of your refusal to pay commission. Is that right? A. I never refused to trade, understand me. I didn't refuse to complete the deal. I simply raised the question whether that was a clear title. They refused to go on with the deal, rather than furnish what I would consider a clear title. I was told the lease was on the land. I didn't tell them that the deal was completed at the farm. I told them to come over to Oskaloosa the next morning; that there were things to be considered yet. I didn't enter into any contract on the farm. I said to Mr. Peppers: 'This is quite a deal. We ought to consider it; think it over.' I said there were lots of things to come up that we haven't thought of. I told him to come to Oskaloosa in the morning, and he said he would. He came, and, of course, as I have stated, in the meantime this matter of a clear title came into my mind.

Without setting out the evidence in full, there is evidence from which the jury might have found that the defendant accepted the farm with the coal lease on it; that all the

1. **BROKERS:** action for commission: evidence. terms of the exchange were agreed upon between Peppers and the defendant while on the farm; that there was nothing said between them as to the character of the title of the property of either; that the only agreement was to furnish an abstract, if requested. It appears that no request for an abstract was made by either party. There is evidence to the effect that this mine had been abandoned from fourteen to sixteen years; that the defendant had full knowledge of the character of the work done in the mine, and the condition in which the

land was left; that he saw a copy of the lease the first time he was down there. He testifies, however, that he did not know the terms of the lease. There is evidence that at the time he was about to return home from the farm, after examining it with his wife, he said he would take the place on the terms, and Peppers and the plaintiff said, "We will go to Albia and draw up the contract;" and he said, "I cannot go to Albia, but will meet you in Oskaloosa the next morning. Come to Oskaloosa in the morning, and we will draw up the contract. Everything is satisfactory that we have agreed satisfactory; that we have agreed upon."

From the evidence submitted, the jury might well have found the following facts: That the defendant employed plaintiff to procure the exchange of property between him and Peppers; that plaintiff brought the defendant and Peppers together; that they entered into a contract satisfactory to both for the exchange, on defendant's second visit to the farm; that nothing was said about the character of title to be delivered by either; that it was agreed that an abstract should be given by each, if requested; that no abstract was requested; that Peppers appeared the next morning at Oskaloosa at the request of the defendant, and that he was then ready, able, and willing to perform all the conditions of his contract, and make the exchange agreed upon; that the defendant objected to carrying out the contract because of the lease, fearing that the lease might interfere with the resale of the property. The jury might well have found that the defendant was informed, before he made the contract, of all the conditions of the lease, and that he agreed to take it subject to the lease. Surely, then, the plaintiff had performed all that was required of him, or that he could perform in consummating the deal. It was then up to the defendant to perform; Peppers being ready, able, and willing to perform. His refusal to perform did not relieve him of his obligation to pay plaintiff's commission. So much for the facts.

The first complaint made by the defendant is that the

court refused to sustain his motion to transfer the cause to the equity side of the calendar for trial.

2. **SAME: reformation of contracts: jurisdiction.** Plaintiff claims that he has alleged in his answer certain equitable matters which entitle him to have the case so transferred. He seems to base this on the idea that equity has jurisdiction to reform contracts, and that his rights could not be protected until the contract, as stated by plaintiff in his petition, was reformed. But it is apparent, from this record, that both the contract between the plaintiff and the defendant and the contract between defendant and Peppers rest in parol. There was no writing evidencing either contract. Equity will not make contracts for parties, nor *reform contracts*. Equity only takes cognizance where the contract has been reduced to writing, and the writing does not express truly the actual contract entered into between the parties. Where the writing, through fraud or mistake, does not express the true contract, equity will reform the writing, which is the evidence of the contract, to conform it to the real contract, as actually made between the parties. But where the contract rests in parol, parol evidence is necessary to establish the contract, and the contract is that which the evidence shows it, in fact, was, and is enforced according to the proof, whether in law or in equity. This is clearly a law action; and the court did not err in refusing to transfer the cause to equity for the purposes suggested by the defendant.

The next contention is that the contract between Fahrney and Peppers was not in writing; that no binding contract was made effectual between Peppers and the defendant. This is not necessary. The contract having been made between Peppers and defendant in parol, and Peppers having appeared ready, able and willing to perform his contract and to make the exchange, and to make the writing to evidence the exchange, the fault was the defendant's that it was not consummated. All that was necessary to be done by the defendant was to consum-

3. **SAME: recovery of commission: statute of frauds.**

mate the contract by reducing it to writing to make it an effectual, binding contract upon Peppers. He cannot hide behind his own wrong in refusing to do so.

As stated in *Bird v. Phillips*, 115 Iowa, 703: "Another objection in this connection is that plaintiff did not have a binding agreement with the would-be purchaser. A verbal agreement on the part of the buyer that he would effect the purchase is sufficient." See, also, *Ford v. Easley*, 88 Iowa, 606.

In this last case it is said: Where an agent "is employed to sell property at a designated price, and on stated terms, he is entitled to his commission when he has found a customer who is able and willing to take the property at that price, and on those terms, whether a sale is consummated or not." And it is the holding of this case that, when an agent finds a person who agrees to take the property on the terms given, and is able, ready, and willing to carry out the agreement, he has done all he was authorized to do to effect a sale, and is entitled to his compensation for his services.

The rule generally is that, where an agent who is authorized to procure a purchaser for his principal's land, or to make an exchange of land, on terms satisfactory to his principal, procures one who is ready, able, and willing to purchase, or make the exchange on terms satisfactory to the principal, and an oral contract is entered into between them as to the terms upon which the sale or exchange shall be made, and the sale or exchange is actually agreed upon, satisfactory to both parties, though not reduced to writing, and though not enforceable by either the buyer or the seller because of the statute of frauds, yet, if the purchaser procured is, at the time, ready, able and willing to perform all the conditions of the contract and enter into a written instrument binding both parties, and nothing remains to be done on the part of the agent's principal except to make the writing which would bind it, and he refuses to do so, the agent is entitled to his commission, because he has done all that

his contract requires him to do, and has earned his commission. The failure to consummate the contract was the fault of his principal alone.

Some complaint is made of the action of the court in refusing defendant the right to show that Peppers had subsequently sold the land to another. There was no error in this. The plaintiff was not bound to hold
4. SAME: recovery of commission. Peppers in readiness, at all times, after defendant had refused to complete the contract. Nor could he control Peppers' action in disposing of the land thereafter. Defendant had his opportunity and refused to avail himself of it.

Many other questions are raised and argued on this appeal which are in no way relevant to the issues joined, and no way determinative of any right involved in this suit, and we pass them by without comment. This is purely a fact case, with the evidence conflicting. The jury have decided the facts in favor of the plaintiff, and there is evidence to support their finding. In such cases we do not interfere.

Some question is raised as to the instructions given by the court. We have examined these instructions with care, and find that they fully and fairly present all the issues and the law proper to be submitted to the jury in determining a case of this character. The law governing the rights of the parties, under facts such as are disclosed here, has been so often discussed by this court, and so fully determined, that we do not feel called upon to reconsider these questions again.

Practically the only issue raised by defendant's answer involved the truth of plaintiff's contention, as set out in his petition. A general denial raised the only issue which could be properly submitted to the jury under this record, and it was so submitted by the court.

The special interrogatories asked by the defendant could not properly have been submitted by the court. The jury

are not required to find specially the truth or falsity of every claim raised by a party in his pleadings.

5. PRACTICE: special interrogatories.

This is true where the ultimate conclusion depends upon the existence or non-existence of many facts, each of which have a relation to, and form a chain in, the facts and circumstances on which the final conclusion rests, and courts do not submit special interrogatories to juries, except as to the ultimate facts.

We have examined this record, and we find no reversible error, and the cause is therefore—*Affirmed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

MIKE CARNEGO V. CRESCENT COAL COMPANY, Appellant.

Infants: WRONGFUL DEATH: RECOVERY OF BURIAL EXPENSES. Under
1 the statute of this state a father and, in case of his death, imprisonment or desertion of his family, the mother can recover for expenses and actual loss of services resulting from the injury or death of a minor child; and included in the term expenses are those of suitable burial.

Same: BURIAL EXPENSE: REASONABLE VALUE: EVIDENCE. While proof
2 of the cost of an article on the open market or at auction is some evidence of the reasonable value of the article, evidence simply that plaintiff paid a specified sum for the burial expenses of his minor child negligently killed, though admissible to show that such expense had been incurred, was insufficient to show the reasonable value of the same and to justify submission of that issue to the jury.

Mines and mining: NEGLIGENCE: INSTRUCTIONS: REFUSAL OF REQUEST.
3 Where the court instructed that plaintiff could recover only in case the jury found that it was defendant's duty to inspect the roof of the mine where decedent was at work, and failed to perform such duty, and that if it was decedent's duty to make such inspection, or if the roof was subject to change brought about by decedent or the other workmen, and its dangerous condition thus resulted he could not recover, there was no occasion for giving a requested instruction that the burden was upon plaintiff to show

that the falling of slate from the roof which caused decedent's death was one of the dangers incident to his employment.

Same: INFANTS: NEGLIGENT DEATH: DAMAGES. A parent is entitled to recover for the negligent death of a minor child the present worth of his probable earnings to the time of his majority, less the probable cost of his support and maintenance for such time.

In the instant case the net earnings of a minor son for about two years and five months, including a reasonable sum for burial expenses is not shown to have exceeded \$1,000.00.

Appeal from Mahaska District Court.—HON. JOHN F. TALBOTT, Judge.

TUESDAY, MARCH 24, 1914.

ACTION by a parent for the expenses and loss of services of a minor son, killed, as is alleged, by the negligent act of the defendant. From judgment against it, the defendant appeals.—*Affirmed on condition.*

Burrell & Devitt and John T. Clarkson, for appellant.

S. V. Reynolds and McCoy & McCoy, for appellee.

LADD, C. J.—The facts are sufficiently stated in *Carnego v. Crescent Coal Company*, 163 Iowa, 194, where the action was by the administrator of the estate of the deceased. In this action the father sought to recover for ex-
1. **INFANTS:**
wrongful death: penses of burial and loss of services, to which recovery of burial expenses. he would have been entitled had his son lived until he attained majority. Appellant first contends that there can be no recovery in such a case for funeral expenses. At the common law it was the duty of the father to inter his child upon death decently and to defray the necessary funeral expenses. *Reg. v. Vann*, 5 Cox. C. C. 379. If death occurred instantly, he could not recover from the wrongdoer causing the loss of services or for funeral expenses, *Trow v. Thomas*,

70 Vt. 580 (41 Atl. 652), but if the child survived some time, he might recover for such loss up to the time of his demise, together with expenses for medical attendance, nursing and the like. *Louisville, New Albany & Chicago Railway Co. v. Goodykoontz*, 119 Ind. 111 (21 N. E. 472, 12 Am. St. Rep. 371); *Jackson v. Railway*, 140 Ind. 241 (39 N. E. 663, 49 Am. St. Rep. 192); *Carey v. Railway*, 1 Cush. (Mass.) 475 (48 Am. Dec. 616), and valuable note at page 622; *Southern Ry. Co. v. Covenia*, 100 Ga. 46 (29 S. E. 219, 40 L. R. A. 253, 62 Am. St. Rep. 312); *Augusta Factory v. Davis*, 87 Ga. 648 (13 S. E. 577; 29 Cyc. 1641).

The subject is now regulated by section 3471 of the Code, providing that: "A father, or in case of his death or imprisonment or desertion of his family, the mother, may as plaintiff maintain an action for the expenses and actual loss of service resulting from the injury or death of a minor child." In view of the previous state of the law, there can be no doubt of what was intended by this statute or the word "expenses." It has reference to the reasonable cost incurred for medical attendance, nursing and the like, including that of suitable burial. *Cleary v. City Ry. Co.*, 76 Cal. 240 (18 Pac. 269); 6 Thomp. Neg., section 7093. Statutes authorizing recovery for the wrongful death of a minor child, not specifying expenses, are construed in England and several of the states so as not to include the cost of burial. See *Dalton v. Ry.*, 4 C. B. (N. S.) 296. *Consolidated Traction Co. v. Hone*, 60 N. J. Law, 444 (38 Atl. 759). These decisions are not in point, and funeral expenses were rightly held recoverable.

II. The only evidence concerning the expenses of burial was that given by plaintiff's son, John Carnego: "Do you know how much the funeral expenses were in this case? A. \$529.25. Q. Who paid it? A. I did. Q. Whom did you pay it for? A. I paid it for my father. Q. Who gave you the money to pay it with? A. My father." Objection was made to each

2. SAME: burial
expense: rea-
sonable value:
evidence.

question and overruled. The evidence was admissible as tending to show that the expenses had been incurred and paid. Was it sufficient to establish the reasonableness of the cost? Had the various items making up these expenses and the cost of each been stated, there might have been room for the jury to infer therefrom the reasonable value thereof, and whether they were such as properly might be chargeable against defendant for the interment of a person in deceased's station in life.

It seems well settled that proof of what has been paid for an article of personal property recently in the open market, or when sold at auction, or when it has no market value and its change of condition is shown, is received as furnishing some evidence of its actual or reasonable value. 3 Chamberlayne on Evidence, sections 2175-1b, 2175-1c. Thus in *Bird v. Everard*, 4 Misc. Rep. 104 (23 N. Y. Supp. 1008), what plaintiff paid for an overcoat in the absence of other proof was held sufficient to show its value and in *Small v. Pool*, 30 N. C. 47, evidence of what plaintiff gave for a slave and what he afterwards sold her for was admitted as an aid to the jury in assessing damages.

In *Motton v. Smith*, 27 R. I. 57 (60 Atl. 681, 8 Ann. Cas. 831), the court observed that "an owner is doubtless usually qualified to state the cost price of articles of personal property, and from that, with information as to age and wear, the jury might estimate values." In *Swanson v. Railway*, 116 Iowa, 304, the holding was that a witness might testify "to the price paid for land as tending to show its market value." In *Richmond v. Railway*, 40 Iowa, 264, the cost of a building was received in evidence, not as the measure of damages, but as a means to aid the jury in arriving at its present value. See *McMahon v. City of Dubuque*, 107 Iowa, 62; *Jones v. Morgan*, 90 N. Y. 4 (43 Am. Rep. 131); *Sullivan v. Lear*, 23 Fla. 463 (2 South. 846, 11 Am. St. Rep. 388); *Thompson v. Anderson*, 94 Iowa, 554.

Other cases might be cited illustrating the application

of the rule indicated. There is nothing here, however, to show for what the funeral expenses were incurred, or what was paid for the several articles as distinct from services rendered. If the articles were purchased on the open market, the amount paid would be some evidence of their reasonable value. But the question still remains as to the propriety of procuring that which was obtained as reasonably essential to the decent burial of deceased. See *Foley v. Brocksmit*, 119 Iowa, 457, where this court exacted a remittitur of all in excess of \$150, where \$455 had been allowed as funeral expenses. Moreover, it seems quite clear from the authorities that a different rule obtains in proving the value of services rendered or repairs made than in showing what articles of personalty are worth. This is on the ground that no criterion, as that of the open market, is ordinarily furnished the jury by which to estimate the value of what is done. Thus in *Hobbs v. City of Marion*, 123 Iowa, 726, it was said: "The jury may, and, indeed, must, be left to place its own estimate upon damages for pain and suffering, for they are not measurable by the test of market values; but the value of services and the amount of damages to property are matters concerning which, under ordinary circumstances, direct and competent evidence is available, and without it they should not go to the jury."

In *Schimpf v. Sliter*, 64 Hun, 463 (19 N. Y. Supp. 644), it was adjudged that "to allow proof of the amount paid by plaintiff to his physician without showing the value of the services" was error, and this ruling was confirmed by the Court of Appeals in *Gumb v. Railway*, 114 N. Y. 411 (21 N. E. 993), where it was held to be error to allow the plaintiff to testify to the amount paid for the reparation of a wagon without evidence of the value thereof and also in allowing him to testify what was a physician's charge for his services without evidence of payment or the value of the services other than the remark of the physician stating the amount of his bill and that it was small.

In *Wheeler v. Railway*, 91 Tex. 356 (43 S. W. 876), the court held that the injured party must prove what would be reasonable compensation to the physician for the services rendered and would be entitled to recover that amount if he had paid or was liable to pay the same, adding: "It was error in the trial court to submit to the jury the question of the medical bill paid by the plaintiff for services rendered to him, because there was no proof that such amount was a reasonable compensation for the services rendered." In *Massena Savings Bank v. Garside*, 151 Iowa, 168, and *Waltham Piano Co. v. Freeman*, 159 Iowa, 567, allowing the jury to take into consideration the amount paid an attorney without proving its reasonable value, was held to have been erroneous. We have held, however, that where the services rendered are of a nature likely to be familiar to the jury and the charge is not questioned, its reasonableness may be safely left for their determination. *Lampman v. Bruning*, 120 Iowa, 167; *Scurlock v. City of Boone*, 142 Iowa, 684.

In *Sachra v. Town of Manilla*, 120 Iowa, 562, the court instructed that the plaintiff should be allowed for money expended for medical treatment, and this was criticized for not stating instead that he was entitled to recover the reasonable value of the expenses incurred therefor, and the court, after directing attention to the fact that the evidence indicated that the services of one physician were worth \$100, and that the bill of the other was not over \$20, held that this justified the instruction, citing *Flanagan v. Railway*, 83 Iowa, 639, where the expenses were shown to be \$40 or \$50, and the court, after stating it was not "pretended that the expenditure of such a sum was unreasonable or unnecessary," decided that it would not be presumed that the finding of the jury exceeded such amount, and therefore no prejudice was suffered from the instruction.

In *Vedder v. Delaney*, 122 Iowa, 583, it appeared that the plaintiff after being injured was kept by the officers charged by the law with relief of the poor, and cared for

at the expense of the county, and he testified that he had promised to reimburse the county for the expenses incurred and proved the items and amount of such expenditures. In response to the contention that such evidence was not admissible, the court, after showing that he was entitled to reasonable and fair value of the expenses, observed that: "It has often been held that proof of what the plaintiff has in fact paid for such necessary services is some evidence of their reasonable value, and is sufficient to justify the submission of the question to the jury" (citing the *Lampman* and *Sachra* cases and *Colwell v. Railway*, 57 Hun, 452, 10 N. Y. Supp. 636), adding: "The fact that the expenses in this case were first assumed or paid by the county, and that thereafter plaintiff undertook or agreed to reimburse the county for the expenditures in his behalf, does not make the rule any less applicable." The point actually decided seems to have been that stated in this excerpt, and the previous suggestion as to the cost of services, not inconsistent with the *Lampman* case, to have been made in aid of this conclusion. The decisions of this state, as seen, do not sustain the thought that the amount paid for services of any nature is enough evidence to warrant submitting the issue as to the sum, for in *Sachra v. Town of Manilla* value was otherwise proven and in *Lampman v. Bruning* and *Scurlock v. City of Boone*, this was permissible only where the services and their value were likely familiar to the jury. In *Colwell v. Manhattan Ry. Co.*, 57 Hun, 452 (10 N. Y. Supp. 636), a nurse was paid \$100 for nursing the plaintiff six months, and after directing attention to the rule that the price was some evidence of the value of property, the court says: "The price actually paid for personal services, such as those of this nurse, may be considered as some evidence of the value of the work performed, and constitute competent proof sufficient to warrant the jury in considering the item in the assessment of damages." This was correct as applied to the services of an unskilled nurse (*Scurlock v. City of Boone, supra*), and

if it related to skilled nurses, any value the ruling may have had as authority, the court being intermediate, was destroyed by the decisions of the Court of Appeals of New York heretofore cited, announcing a different doctrine. Services personal or otherwise are so various and differ so much in their nature and value that general application of the principle pertaining to proof of value of property ought not to obtain. It is matter of daily observation that prices paid different persons for like services differ radically. There is no general criterion, such as the open market, by which to ascertain what the rendition of a specified service is worth. This often depends on experience, or environment, and frequently on opportunity. One will exact many times as much as another for precisely the same service, and it is not exacting too much to require something more than mere proof of cost, save in the more familiar employments where supply and demand regulate somewhat as in the open market, or prices are uniform, in order to establish the reasonable value of services rendered. Moreover, if this were not so, as the services rendered were not disclosed, the jury could not, in any event, fix their value.

The general statement of the cost of funeral expenses, in the absence of any other evidence, did not justify the submission of the reasonable expense thereof to the jury.

III. Exception is taken to the refusal of the court to instruct the jury that the burden was upon the plaintiff "to establish by a preponderance of the evidence that the fall-

3. MINES AND
MINING: negli-
gence: instruc-
tions: refusal
of request.

ing of the slate from the roof that caused the death of Frank Carnego was not one of the dangers incident to the employment in which said Frank Carnego was then and there engaged," and that if he failed to do so, verdict should be for the defendant. There was no error, for the court had submitted to the jury whether it was the duty of the defendant to inspect and care for the roof at the point where deceased lost his life, and that recovery could only be had in

event the jury found that it owed him such duty and failed to perform it. The converse of this proposition also was stated in saying that if it was the duty of the deceased and those working with him to inspect and care for the roof of the entry, or that the entry was subject to change wrought by the deceased with others, and its condition was the result of what they did when in control thereof, there could be no recovery. These instructions included the proposition contained in the request. Indeed, it has often been held that practically there is no such thing as the assumption of a risk save that of the negligence of the employer, and that the servant of necessity enters into the employment of the master with reference to existing conditions or those created by the work, and surely if it was the duty of the defendant to inspect and care for the roof so as to render it safe, and it failed to do so, the servant cannot be said to have assumed also the duty of inspection or care as incidental to his employment. There was no error in refusing the instruction.

IV. The deceased would have attained his majority had he lived until October 7, 1913, so that the services to which plaintiff would have been entitled were for two years, four months, and twenty-five days. In answer to

4. SAME: infants:
negligent death:
damages. special interrogatories, the jury found that he would have earned during this time \$1,860.39; that the cost of his support and maintenance would have been \$241.57, and plaintiff was allowed \$300 for funeral expenses. The court, according to the briefs, concluded that the cost of maintenance would have been at least \$738.85, and that the allowance for funeral expenses should not have exceeded \$150, and required a remittitur of \$643.81, reducing the judgment to \$1,275. The evidence disclosed that during the twenty-six months previous to his death the deceased had earned as a miner \$955.05, that the average earnings in the mine had been \$52.36 a month, and that miners ordinarily at that particular mine are not employed to exceed 270 days a year, while in others the average is 217 and 218 days per

year. He earned a little over \$62 per month during July and August, 1910, and from January 1, 1911, to May 12th of that year his entire wages amounted to but \$160.50. He was working with three adults, receiving his equal share of the earnings, and these amounted to about \$37 a month, and yet the jury on this evidence found that he would have earned but for his death \$62 or \$63 per month until he was of age.

The plaintiff was entitled to recover the present worth of the probable earnings of the deceased up to the time he would have become of age, less the probable cost of clothing, maintenance and the like (*Benton v. Railway*, 55 Iowa, 496), and it is manifest from the figures given that more than this was allowed.

If the plaintiff cares to file a remittitur of enough with the \$150 allowed for funeral expenses to reduce the judgment to \$1,000, with interest, within thirty days, it will stand affirmed, with costs; otherwise reversed. *Affirmed* on condition.

DEEMER, GAYNOR, and WITHROW, JJ., concur.

E. M. SHEFFIELD, Appellee, v. HANCOCK COUNTY, IOWA, and
A. W. BINGHAM, ANDREW ANDERSON, W. G. GREEN, O. A.
PHELPS, JOHN T. BUSH, MEMBERS OF THE BOARD OF
SUPERVISORS OF HANCOCK COUNTY, IOWA, Appellant.

Conveyances: **CONSIDERATION:** **SPECIFIC PERFORMANCE.** Where a board
1 of county supervisors and a purchaser from the county of a lake bed both thought that the county had some interest therein, although the extent of the interest was admittedly doubtful, and both knew it was questionable if the purchaser could perfect title after conveyance by the county, a contract for a quit claim deed upon a valuable consideration was enforceable; and the county could not defeat specific performance even though it had no right or title to convey.

Specific performance: TENDER: SUFFICIENCY. In this action for specific performance plaintiff tendered a draft to the county auditor, which he refused, but upon request of plaintiff the auditor held the same until the meeting of the board, which was after the time for performance, when it was returned to plaintiff and he receipted for it. *Held*, that there was sufficient compliance with the contract to support the action.

Appeal from Hancock District Court.—HON. J. F. CLYDE, Judge.

TUESDAY, MARCH 24, 1914.

ACTION for specific performance of a contract to quit-claim interest in certain real estate. From a decree for plaintiff, the defendant appeals.—*Affirmed*.

C. R. Wood, for appellant.

Birdsall & Birdsall, for appellee.

WITHROW, J.—I. On June 5, 1900, the board of supervisors of Hancock County passed a resolution authorizing and directing the chairman of the board and the county auditor to enter into a contract of sale with the plaintiff for the two hundred and ten acres comprising what was known as Twin Lake, in said county, for \$1,050, to be paid \$210 cash, with contract, and \$840 on or before five years, and agreed to give a deed conveying the rights of said county in and to said lake. This action was taken in pursuance of proceedings had at the previous April session of the board of supervisors. The final resolution passed on June 5th is as follows:

Be it resolved, by the board of supervisors of Hancock county, Iowa, that, whereas, the sale of East Twin Lake to E. M. Sheffield, ordered at the April session of the board, at \$5.00 per acre, \$1.00 per acre cash and \$4.00 per acre to be paid on or before five (5) years, has been partially carried out by Mr. Sheffield's paying to the chairman of this board

the cash payment of \$210.00, for which he holds the chairman's receipt, therefore, be it resolved, that said sale be completed, and the contract therefore this day submitted to the board is hereby approved, and the chairman of this board and the county auditor are hereby instructed to make the said contract a part of the record of this meeting. Vote on the above resolution was called by the chairman with result as follows: G. Carlson, R. M. Day, and E. P. Fox, voting, 'Aye,' C. W. Richards and F. J. Oxley, voting, 'No.'—Motion was declared carried.

The contract provided that \$210 or \$1 per acre was to be paid upon the execution and delivery of the contract, and acknowledged receipt of that amount, and that the further and final payment of \$840 should be paid within five years from the date of the contract. The terms of the contract, as bearing upon the interest to be conveyed, and the rights of the respective parties under the conveyance, were as follows:

This agreement, made and entered into on this 5th day of June, A. D. 1900, by and between Hancock county, Iowa, of the first part, and E. M. Sheffield, of Belmond, Wright county, Iowa, of the second part, witnesseth: That, in consideration of the covenants hereinafter mentioned to be performed by the second party, the first party hereto agrees to convey by properly executed quitclaim deed, or deeds to the second party, E. M. Sheffield, or to the person or persons who may be named or designated by the second party, to receive such deed or deeds, the entire interest of the first party in and to the real estate or tracts of land and water commonly known as 'East Twin Lake' and located in sections 19, 20, 29, and 30, of Twin Lakes township, Hancock county, Iowa, and containing two hundred and ten acres, more or less, as may be shown by the government survey of the same, being all that part within the meandered lines of the said lake, and the first party agrees to do whatever may be possible or necessary for them to do in the way of executing papers, to convey whatever interest the said first party has in said land to the said second party, or to the person or persons designated by him, but it is understood that the first party in no manner guarantees that any title now rests in

the said Hancock county, to said real estate or tract of land and water, and that first party in no manner agrees to be to any expense to obtain title to the said tract of land and water, either in second party or in first party or in second party's assigns; and it is further understood and agreed that all litigation that may arise in connection with the said real estate or tract of land and water, and expense thereof shall be borne by second party or his assigns, and it shall not be necessary for the first party to make any appearance in any such litigation, excepting at the expense of the said second party or his assigns.

The plaintiff pleads that he made the payments in accordance with the terms of the contract, the last payment having been made on June 5, 1905, and that immediately after his purchase he took actual possession of the property, and has since and at all times been in possession. He pleads a refusal on the part of the defendant to make the conveyance, and asks decree for specific performance of the contract. For answer the defendant pleads a general denial, and also that the board of supervisors had no legal right to enter into the contract, and that the contract sued upon is illegal and void, and that the auditor had no authority to receive or receipt for any money paid for or on account of the contract. The cause was tried upon these issues, resulting in a decree as prayed, from which the defendant appeals.

II. The principal question presented in the case is that relating to the authority of the board of supervisors to enter into the contract, it being claimed that Hancock county had

1. CONVEYANCES : no title or interest in the land and water
consideration : embraced within its terms, and, being thus
specific per- without any right, it had no power to enter
formance.

into any agreement which would affect the rights of the actual owner. The right to enter into such a contract and be bound by it is challenged on no other grounds. It is the particular claim of the appellant that at the time the contract was made the title to the property was in the state, and the county was without any interest which would be subject to contract or

conveyance by it. If there was no title or right at that time held by it which would be the proper subject of a contract to convey title, and which was known to the parties, a decree for specific performance could not be granted. *Ormsby v. Graham*, 123 Iowa, 202. But that is not the question presented by this record. The contract between the parties was, as gathered from its terms, with the express knowledge of both, that the county did not claim to own or assume to convey other than the bare rights covered by a quitclaim, and definitely excluded all conditions of warranty, claim of right, or liability for failure of title; and the purchaser expressly assumed the burden of all such claims, obligations, or litigation as might thereafter arise. The contract in question was made in 1900, and covered that which was termed in the instrument as being commonly known as East Twin Lake. What may have been the interest of the county in the property is not shown by the proof. That the board of supervisors then believed that there was some interest held by the county, and that the appellant shared in that belief, cannot be questioned under this record. Both dealt with the subject, however, in such manner as to indicate that the extent of that interest was uncertain, and might be defeated, but such afforded a sufficient basis for a contract. On the part of the purchaser there was moving to him a benefit or right contingent upon his ability to establish his title to the property, admittedly doubtful, but constituting a good consideration. 9 Cyc. 312. On the part of the county was the evident claim of an ownership which was valuable, but which might be subject to litigation, and for the consideration named it agreed to part with that right. We think the contract was an enforceable one, by either party, and therefore, one under which the appellee is entitled to have settled his rights, whatever they may be, if he has done the things required of him to entitle him to specific performance.

III. The appellant claims that the appellee did not make the payments within the time fixed by the terms of the

contract, and also that the payments alleged to have been made or tendered were not to persons authorized to receive them. The first payment of \$210 was made to the chairman of the board of supervisors, and was acknowledged by the county in the resolution of the board authorizing the contract and sale. Later the county attorney sent to Sheffield, the appellee, a draft for \$210, in an attempt to return that payment, which was refused by Sheffield and returned to the sender. In the spring of 1905, and before the expiration of the period fixed by the contract for final payment, the appellee sent to the county auditor a draft for \$840, the final payment, which the latter refused to accept; but upon request of Sheffield it was held by the auditor until the meeting of the board, and was then returned to him, receipt being taken from Sheffield. No claim was made at the time other than the want of authority in the county to convey.

It is suggested in argument by the return of the \$210 payment there was a denial by the board of supervisors that appellee had any rights under the contract. This may be conceded, but a denial of the right would not destroy it, if it had actually arisen; and, as we have concluded in the previous division of this opinion that there was an enforceable contract, the attempt of one of the parties to it to thereafter repudiate or deny it would not affect the rights of the other.

The subsequent offer to pay the balance due on the contract by the delivery of a certified check in June, 1905, which was not objected to as not being money, but was returned to Sheffield in September by the county auditor after the board had met, was a sufficient compliance by the purchaser with the terms of the contract; and his demand for execution of the quitclaim deed, which was refused, entitle him to maintain this action, and to a decree requiring the execution of the quitclaim deed. Such was the finding of the trial court, and its decree is—*Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

EFFIE TODHUNTER, Plaintiff, v. LAWRENCE DE GRAFF, JUDGE,
Defendant.

Divorce: VACATION OF JUDGMENT FOR FRAUD. The court has power to
1 correct its own records during the term, and to modify, set aside
or expunge an order or decree theretofore entered at the same
term; and where a decree of divorce was procured by fraud or
perjury the court, upon its own motion and upon due notice to all
parties interested, had power to reopen the case and set aside the
decree; and the fact that the information came from a stranger to
the suit was immaterial, as the court acted upon its own mo-
tion.

Same: VACATION OF DECREE: NOTICE. Where notice of divorce pro-
2 ceedings was served upon a non-resident defendant by publica-
tion, for whom no appearance was made, it was the duty of the
court to protect itself and the rights of the defendant against the
fraud or perjury of the plaintiff; and no notice to defendant was
required of a hearing to determine whether the decree was pro-
cured by fraud.

Same. Where it did not appear that plaintiff in divorce proceedings
3 had married another after divorce from her former husband, but
it did appear that both before and after the decree she had illicitly
cohabited with another, such other party was not entitled to notice
of the proceedings instituted to determine whether the decree of
divorce was obtained by fraud; since, as it appeared that their
cohabitation was meretricious, there was no legal presumption of
marriage.

TUESDAY, MARCH 24, 1914.

Certiorari proceedings to the District Court of Polk
County to review an order setting aside a decree of divorce
granted to the plaintiff.—*Affirmed.*

George Wambach and Berry & Watson, for plaintiff.

No appearance for defendant.

DEEMER, J.—May 2, 1913, plaintiff filed a petition in the district court of Polk county, asking for a decree of divorce from her husband, Clift Todhunter, alleging desertion as a ground therefor. Service of notice was made by publication and at the following September, 1913, term of court, the matter came on for hearing, the defendant not appearing, and, upon hearing the testimony offered on behalf of plaintiff a decree of divorce was granted on the 11th day of September of that year. The decree was absolute and awarded plaintiff the custody of the minor child.

On September 15th of the same year plaintiff filed a supplemental petition or application in which she asked that the court modify its decree, and permit her to marry. This application was granted and a supplemental decree was passed giving her permission to remarry. It is claimed that pursuant to the permission she did marry one Joe Heather.

On October 11, 1913, and during the same term of court one Allison, a stranger to the proceedings, appeared before the judge trying the case and filed an affidavit in which he charged that plaintiff, during the pendency of her divorce proceeding and afterward, had been living in open adultery with Heather; that the defendant in the divorce proceeding had, as plaintiff well knew, been in the insane hospital at Clarinda where he had been confined until the winter or spring of the year 1913; that he had never deserted the plaintiff, as she well knew; that plaintiff was in fact a resident of the city of Indianola, in Warren county, at the time she commenced her suit in Polk county; and that at the time she brought her suit for divorce she contemplated marrying Heather. The affidavit also showed that just previous to the bringing of her suit in Polk county, plaintiff had commenced an action for divorce from her husband in Warren county, in which she alleged as grounds therefor cruel and inhuman treatment and habitual drunkenness, that a guardian ad litem was appointed for the defendant in that suit, who had filed an answer, and that but a few days before bringing the suit

in Polk county she had dismissed her action in Warren county. Upon this affidavit, and from other sources of information, the trial court made the following order:

Whereas, on the 11th day of September, 1913, the above-entitled cause came on for trial before the undersigned judge of the district court in and for Polk county, and whereas, on the 11th day of September, 1913, a decree was signed and entered in said cause, and whereas, since the entry of said decree in said cause, information has come to this court and to the judge presiding in said cause that the plaintiff was not a bona fide legal resident of said county and state at the time of filing her petition in said cause, and that her residence in Polk county, Iowa, was not in good faith and was for the purpose of obtaining a divorce, and further that the defendant in said cause upon whom notice by publication was had for the purpose of giving this court jurisdiction in the premises was at said time an insane person, and was at said date not a discharged patient from the said hospital for the insane at Clarinda, Iowa, and further that the allegations of the plaintiff in her petition that the said defendant was guilty of willful desertion for more than two years was false and untrue, and that the proof offered in support thereof upon the trial of said cause was false and untrue, and in support of the falsity of the allegations of plaintiff in her petition hereto is attached and made a part of the affidavit of one Frank Allison and in order that the truth of the statements therein contained and to determine whether or not perjury has been committed and fraud practiced upon this court, the court on its own motion orders that said cause be reopened, and it is further ordered that notice be served upon the plaintiff, Effie Todhunter, that further hearing shall be had in said matter before this court on the 20th day of October, 1913, at 2 p. m., and that notice of said hearing shall be served upon the plaintiff, Effie Todhunter, at least five days prior to said date.

This order was made on the 14th day of October, 1913, and a notice, of which the following is a copy, was served upon the plaintiff:

To Effie Todhunter: You are hereby notified that an order of court has been entered in the above-entitled cause, a

copy of which is hereto attached, ordering and directing the reopening of said cause for the purpose of determining the truth or falsity of the allegations of plaintiff's petition and the truth or falsity of the proof offered in support thereof upon the trial of said cause, and you are notified that under order of court said cause shall be reopened for the purpose of taking further testimony on the 20th day of October, 1913, at 2 p. m., before Lawrence De Graff, judge of the district court in and for Polk county, Iowa. Lawrence De Graff.

Plaintiff responded to this notice, and filed a resistance to the setting aside of the decree, which was accompanied by an affidavit from plaintiff in which she attempted to show residence in the city of Des Moines, Polk county, at the time her petition was filed in that county. She also stated in her affidavit:

That at the time when she commenced the action, she firmly believed that the said defendant was taken to the insane hospital in October, 1909, and that said defendant was committed to the hospital for the insane at Clarinda, on the information of his father, and was against the objections of this affiant. That at the time of said divorce being called, this affiant testified that the said defendant was let out of the hospital for the insane about two years ago and in giving said testimony, she believed that it was two years since he was let out of the hospital. That she has been informed from time to time that the said defendant was working outside of the hospital, and also worked in the laundry of said hospital and was at liberty. That she received a letter from said defendant when he was at or near Sidney, Iowa, and after he was let out of said hospital, purporting to give her notice that he would not live with affiant any longer, that said letter had become lost or was destroyed and she was unable to give the exact date when said letter was written, but believed that the same was about two years prior to the time. That since the filing of the affidavit reciting the dates, etc., affiant has made inquiry as to the exact time or times when the said defendant was committed to the hospital for the insane, and when he was dismissed from said hospital, and found that she was mistaken as to the dates mentioned in her petition and the testimony, and now states that the said defendant

was committed to the hospital for the insane at Clarinda, Iowa, in October, 1910, and was dismissed on parole from said hospital in October, 1912. That for the further confirmation of the dates herein given, she procured the certificate of Max E. Witte, the superintendent of the insane hospital at Clarinda, which is hereby attached and made a part of this affidavit, that this defendant is credibly informed and believes, and upon such information and belief states the fact to be, that the said Clift Todhunter, after the dismissal from the hospital at Clarinda, secured employment on a farm near Sidney, Iowa, with one John Biggins, and that he remained with the said John Biggins, working on said farm for a period of about three months, that during that time he was so employed he made the declaration that he and his wife could not get along together and so he left her, and when he was ready to start for California in January or February, 1913, he stated to the said John Biggins, that he intended to go there to make his home and that he did not intend to take his wife with him for the reason that it was all he could do to take care of himself without being bothered by her, and that the said Clift Todhunter during all of the time he was employed by said Biggins was of sound mind, according to the declaration of the said John Biggins, and he was of sound mind at the time of his leaving for California.

She further recited that her husband, shortly after their marriage, became addicted to the habitual use of intoxicating liquors, and had frequently struck, beat, and bruised her in a cruel and inhuman manner, and that his insanity grew out of the use of intoxicants. She also stated:

That all of the testimony given by this affiant in the trial of said cause was given in good faith, and if she was misinformed as to the facts stated in any of said testimony same was the result of an honest mistake, and was not given with any intent to deceive or mislead the court in any particular, and the facts herein stated are the result of fuller investigation and the result of information derived from the certificate of Max E. Witte, superintendent of the hospital for the insane at Clarinda.

On the issues thus presented, the cause came on for hearing on October 20, 1913, and the trial court made the following order:

Let the record show that this case was reopened on the court's own motion, by reason of the affidavit filed with the court by one Frank Allison, and by reason of other matters called to the attention of the court from other sources including some letters, that the court has fixed today as the time for hearing upon the notice filed in said cause, and that the affidavit referred to was also filed as a part of the order to reopen said cause.

Testimony was adduced pro and con on the question of plaintiff's residence and of her husband's alleged desertion; but the trial court refused to hear any testimony regarding the husband's use of intoxicants and of his cruel treatment of the plaintiff, and, after all the testimony was adduced, the following entry was made of record:

. . . The testimony having been offered and the court being duly advised finds and determines that the petition of said plaintiff in said cause alleges and charges willful desertion on the part of the defendant; and that the said allegation of desertion is the only cause for divorce alleged and charged by the plaintiff in said petition; that the testimony shows that the defendant herein for a considerable time prior to the filing of said petition was an inmate of the state hospital for the insane at Clarinda, Iowa, having been adjudged insane and committed to said hospital as an insane person from Dallas county, Iowa, and at the time of filing said petition was a paroled inmate of said hospital and not discharged therefrom; that the period of the alleged desertion corresponded in time or the major part thereof to the period of commitment and incarceration of the defendant in the said hospital for the insane and during the period of the adjudged insanity of the defendant; that the court further finds and determines that the defendant as an insane person cannot be guilty of willful desertion of his wife as a matter of law, wherefore, for said reason and for other causes and

reasons disclosed by the record in this cause, it is now ordered and adjudged that the decree of divorce heretofore signed, filed, and entered in this cause, and the modified and supplemental decree filed herein, be and the same are hereby vacated, canceled, and set aside. It is further ordered that said cause shall stand for trial at the November, 1913, term of this court and the plaintiff on her own motion and request is permitted and consent of court is hereby given to amend her said petition.

Instead of amending her petition and proceeding with her case at the November term of court plaintiff sued out this writ of certiorari, claiming that the trial court was without jurisdiction in setting aside its former decree and order, and that it acted illegally in that it took into account affidavits from strangers to the proceedings and procured from a former counsel of plaintiff in the Warren county court, letters, etc., which came into his hands as such attorney, thus violating the statute making such matters absolutely privileged.

It will be noticed that the court acted upon its own motion in the proceedings which are called in question, on facts brought to his attention by strangers to the decree, that

1. DIVORCE: vacation of judgment for fraud. notice was given to the plaintiff by order of court, that she appeared and resisted the setting aside of the former decree and order, and that the entire proceedings were at the term in which the decree and order were entered. There was a showing not only of want of jurisdiction of the court to grant the decrees and orders, but also to the effect that the decrees and orders were granted upon testimony which was false and untrue in fact, if not deliberately manufactured. The court did not find want of jurisdiction to grant the original decree, because the testimony was sufficient in its mind, no doubt, to justify the conclusion that plaintiff was a resident of Polk county at the time she commenced her action in that county. That she had been a resident of the state for more than one year is conceded, and no particular length of resi-

dence in the county where suit is brought is required. Code, section 3171, and cases cited.

But it just as clearly appeared that plaintiff's husband had not deserted her and absented himself for two years without reasonable cause. If there had been any desertion, it was for but a short time, and plaintiff was either mistaken or willfully falsified in giving her testimony upon which the original and supplemental decree were based. Moreover, the decree permitting remarriage was evidently obtained by fraud. Under such a state of facts was the court without jurisdiction in setting aside the decree and order, or did it act illegally in so doing?

It seems to us that there is but one answer to this proposition. The trial court at the same term in which the original decrees were entered ascertained that there was a question not only as to his jurisdiction to enter them, but also as to whether both were obtained by fraud, mistake, or willful perjury. Has it no power at that same term, upon due notice to the parties, to investigate these questions; or is it bound to permit the decree and order to stand, because forsooth its information on the subject comes from a stranger or from incompetent sources? We do not understand that any court is so handicapped. At least until the close of the term the court has full power over all judgments, orders, or decrees theretofore entered by it, and upon proper notice to interested parties may change, modify, or set them aside. After the term there may be some doubt about the matter, unless action be brought by proper parties in interest.

Section 243 of the Code provides that the record is under the control of the court, and may be amended or any entry therein expunged at any time during the term at which it is made, and before it is signed by the judge. See, also, the following cases: *Taylor v. Lusk*, 9 Iowa, 444; *Brace v. Grady*, 36 Iowa, 352; *Kirby v. Gates*, 71 Iowa, 100; *Flickinger v. Ry.*, 98 Iowa, 358; *Chicago, Iowa & D. Ry. v. Estes*, 71 Iowa, 603; *Hawkeye Co. v. Duffie*, 67 Iowa, 175. That the information

on which the court acts comes from a stranger is no objection to the order, for the court may act on its own motion. *Wolmerstadt v. Jacobs*, 61 Iowa, 372. Even without such a statute as we have quoted, the court has undoubted inherent power to correct its own records, during the term, and to set aside, modify, or expunge any order, decree, or judgment theretofore ordered at the same term, and the power exists until adjournment *sine die*. *Eno v. Hunt*, 8 Iowa, 436; *Frink v. Frink*, 43 N. H. 508 (80 Am. Dec. 189, 82 Am. Dec. 172); *Hamilton v. Seitz*, 25 Pa. 226 (64 Am. Dec. 694); *Stockdale v. Johnson*, 14 Iowa, 178; *Goodrich v. Conrad*, 28 Iowa, 298; *Robbins v. Neal*, 10 Iowa, 560.

These are very fundamental propositions, and the only question which may ever properly arise grows out of the fact that third parties may have acted thereon, who may be prejudiced by any change. As to plaintiff in this case, who was guilty of the fraud, mistake, or perjury, she is certainly in no position to complain.

In *Rush v. Rush*, 46 Iowa, 648, it was expressly held that a decree of divorce obtained by fraud may be set aside, although the rights of innocent third parties may have intervened. Many cases are cited in the opinion holding to this doctrine, and the rule was applied to a petition to set aside a decree at a term after it was rendered.

The defendant in the divorce proceeding made default and was a nonresident of the state. No appearance had been entered for him, and it was the duty of the court to protect itself and also the defendant from a fraudu-

2. SAME: vacation of decree: notice. lent decree. No notice to him was required.

Whether such notice would have been necessary had an application been made after the term by some party in interest, we have no occasion now to decide. A fraud was perpetrated upon the court, which it was its duty to correct, and this it did by the order in question. *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Adams v. Adams*, 51 N. H. 388, (12 Am. Rep. 134).

One of the singular things about this record is that it does not show when plaintiff married Heather, if at all. There is testimony to the effect that she lived with him before she obtained the decree of divorce, as she says,
3. SAME. to take care of him during an illness, and it also appears that some complaint was made of them because of their relations both before and after the decree of divorce was granted; but we find nothing in the record showing when any marriage ceremony was ever performed, and as they commenced living together in a meretricious way there is no presumption of a legal marriage. There was no occasion, then, for any service of notice on him, and as the action of the court was during term time, and the service was by publication, no notice to the defendant in the suit was required. The court was bound to protect him during the term from a fraudulent decree.

There is no error of which plaintiff may justly complain, and the order must be affirmed and the writ dismissed.—
Affirmed.

LADD, C. J., and WITHROW and GAYNOR, JJ., concurring.

M. K. PICKERELL, Appellee, v. J. E. DAVIS, Appellant.

Partition fences: ASSESSMENT OF COST: JURISDICTION OF FENCE
1 VIEWERS. Fence viewers act judicially with respect to their several duties, and when acting within their jurisdiction their finding is final unless appealed from. Notice, however, to the adverse party is essential to their jurisdiction, whether the proposed act is to apportion a partition fence, or to appraise the value or cost of such fence, and without such notice, whether prescribed by statute or not, their proceedings are void for want of jurisdiction.

Same: NOTICE: JURISDICTION. The statutory powers of fence viewers
2 embrace distinct actions which may be taken at different times and for different purposes, but notice of the proposed action is always essential that the party whose rights are affected may be

heard. Where several matters can all be accomplished at one meeting they may all be included in one notice, but the notice must embrace all subjects upon which it is proposed to act. In the present case the value of the fence was assessed without notice to defendant, and subsequently he was notified of the assessment and directed to pay the cost within the statutory time. *Held*, that the assessment was void, and that the subsequent notice given did not relate back to the time of assessment, so as to sustain the jurisdiction of the viewers to make the appraisement.

Appeal from Mahaska District Court.—HON. K. E. WILLCOCKSON, Judge.

TUESDAY, MARCH 24, 1914.

ACTION brought under section 2358 of the Code of 1897 to recover the value of a fence, erected by the plaintiff, on a partition line between plaintiff's and defendant's land, on the ground that the portion so erected by the plaintiff was ordered, by the fence viewers, to be erected by the defendant, and that the defendant failed to comply with the order. The action is to recover double the cost of erecting the fence, as fixed by the fence viewers, together with the expenses of the fence viewers. It appears that no notice was given to the defendant that the fence viewers would take action in this matter, or of the time and place at which they would meet for that purpose. Verdict and judgment was entered in favor of the defendant, on defendant's motion. The court having set the judgment aside on plaintiff's motion for a new trial. defendant appealed.—*Reversed*.

L. T. Shangle and D. C. Waggoner, for appellant.

J. F. & W. R. Lacey, for appellee.

GAYNOR, J.—The plaintiff and defendant are adjoining landowners. On the application of the defendant, the trustees of their township apportioned the line fence between them and directed each party to build half of the line assigning to each his respective half. From the order of the trustees the

defendant appealed to the district court. The order of the trustees required that each party build the portion assigned him within thirty days from the date of the order. Upon appeal this order was affirmed, and it was further ordered and adjudged that, if either party fails to construct the portion of the fence allotted to him, by the time mentioned, then the other party may construct the same and recover therefor as required by law. This decree was entered on the 13th day of October, 1909. There is no controversy in this case as to the duty of each party to comply with the order so made, and within the time prescribed. Thereafter the plaintiff constructed his half of the fence in accordance with the order of the trustees and the court. The defendant, however, failed to comply with the order and build his fence within thirty days. Thereafter the plaintiff built that portion of the fence assigned to the defendant. Up to this point there is no controversy as to the validity and legality of the proceedings. After plaintiff had completed building that portion of the fence assigned to the defendant, he called out the trustees, as fence viewers, to appraise the cost and value of the same, and they did so do, and made their report and record as provided by law. This was on the 11th day of August, 1911, and on the same day that plaintiff completed the building of the fence. There was no notice given to the defendant of the meeting of the fence viewers, to appraise the value of the fence built by the plaintiff, before that action was taken, and it appears from the record that the plaintiff, on the 11th day of August, 1911, on the day he completed building the fence, called out the fence viewers without giving defendant any notice of the meeting, and, in the absence of the defendant, they proceeded to appraise the value of the fence and assess the costs and expenses of the appraisal to the defendant. This action is brought to recover double the amount of that appraisal. The cause was tried to the court and a jury. At the conclusion of the testimony both parties moved for a verdict. Both parties stated, in open court, that the only

question is a legal one, and ought to be decided by the court, and not the jury, and decided upon their respective motions. Upon the submission of the motions, the court sustained the defendant's motion for a directed verdict, on the ground that the court is without jurisdiction in this suit, for the reason that no notice was served upon the defendant, Davis, notifying him of the time of the meeting of the fence viewers to fix the value of the fence; that the fence viewers were without jurisdiction to bind the defendant to pay double damages, or to pay the value of the fence, without notice to the defendant of a meeting of the fence viewers for that purpose.

The motion made by the plaintiff was overruled. Thereupon the court instructed the jury to return a verdict for the defendant, which was accordingly done. Thereupon the jury was discharged and judgment entered in favor of the defendant, not upon the merits of the controversy, but on the question of jurisdiction; the court holding that the trustees had no jurisdiction to determine the matter in controversy, and their finding was void, and that no right of action could be based on such finding. Thereafter the plaintiff filed a motion for a new trial, and, this being granted, defendant appeals.

It appears that this action was predicated solely upon the action of the trustees in fixing the value of the fence, and for double the amount thus fixed by the trustees, together with the costs and expenses of that proceeding.

No evidence was offered or tendered as to the cost and expense incurred by the plaintiff in constructing the fence, except such as is found in the appraisement by the trustees.

The only question here is whether or not the defendant was entitled to notice of the time and place of the meeting of the trustees in the matter of the appraise-

1. PARTITION
FENCES: assess-
ment of cost:
jurisdiction of
fence viewers.
- ment of the cost and expense of constructing the fence by the plaintiff; whether or not the trustees had any jurisdiction to make any finding or order, binding upon the defendant, without notice to him of the meeting and of the time and place.

Sections 2356 and 2358 (of the Code of 1897) provide :

The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days' notice, in writing to the opposite party, . . . prescribing the time and place of meeting to hear and determine the matter named in said notice. Upon request of any landowner, the fence viewers shall give such notice to all adjoining landowners liable for the erection, . . . of a partition fence, or to pay for an existing hedge or fence. At said time and place the fence viewers shall meet and determine by written order the obligations, rights and duties of the respective parties in such matter, and assign to each owner the part which he shall erect, . . . and fix the value thereof, and prescribe the time within which the same shall be completed or paid for.

If the erecting . . . of such fence be not completed within thirty days from and after the time fixed therefor in such order, the adjoining owner may do or complete the same, and the value thereof may be fixed by the fence viewers, and unless the sum so fixed, together with all fees of the fence viewers caused by such default, as taxed by them, is paid to the landowner so erecting, . . . such fence, within ten days after the same is so ascertained, . . . the person entitled thereto may recover double said sum, together with the fees so taxed, in an action by ordinary proceeding.

Section 2359 provides :

The notices by the fence viewers provided for in this chapter may be served upon any owner nonresident of the county where his land is situated, by publication thereof for two consecutive weeks in a newspaper printed in the county in which the land is situated, proof of which shall be made as in case of an original notice, and filed with the fence viewers, and a copy delivered to the occupant of said land, or to any agent of the owner in charge of the same.

The fence viewers act judicially, in respect to their duties and when acting within their jurisdiction, their finding is final and conclusive upon the parties, unless appealed from. Notice to the adverse party is essential to give them jurisdic-

tion, to make an apportionment of a partition fence, or to appraise the value of such fence, or the cost of construction; and, without such notice, whether the statute prescribes notice or not, their proceedings are void for want of jurisdiction. See *Hale v. Andrews*, 75 Ill. 252; *Thompson v. Bulson*, 78 Ill. 277; *Harris v. Sturdivant*, 29 Me. 366; *Scott v. Dickinson*, 14 Pick. (Mass.) 276; *Lamb v. Hicks*, 11 Metc. (Mass.) 496; *Fairbanks v. Childs*, 44 N. H. 458; *Shriver v. Stephens*, 20 Pa. 140; *Franklin v. Wells*, 6 R. I. 422.

In *Harris v. Sturdivant*, *supra*, the plaintiff brought an action to recover double the value of a fence which he claimed to have built in pursuance of an assignment by the fence viewers and in consequence of the neglect of the defendant to comply with their assignment and adjudications. The question presented in that case was whether the defendant was entitled to previous notice of the meeting to adjudicate the sufficiency of the fence, and to adjudicate or estimate its value. The court in that case said:

Such notice was not alleged, or proved, and is not required by the express terms of the statute. Notice, however, has been held requisite to parties, and those interested in suits and proceedings under penal or remedial statutes, by reasonable and necessary implication, where no express provision was made therefor, upon the general rule and principle of justice that, where the rights of persons are to be adjudicated, some notice shall be given to enable the parties to appear and assert and protect their rights. We cannot infer in this case that the adjudications were to be *ex parte*, because the statute is silent upon the subject, without invading this salutary rule and principle.

In *Scott v. Dickinson*, *supra*, in passing on this same question, the Supreme Court of Massachusetts, said:

The statute directs that where a proprietor, on notice, refuses to make his share of a partition fence, the party aggrieved may apply to two fence viewers, to divide the fence and fix the time within which it shall be made, and if the

delinquent proprietor fails to make his share of the fence within the time ordered, the party aggrieved may make . . . it at his own expense. The statute then proceeds to enact that when the same shall be completed and adjudged sufficient by two or more of the fence viewers, and the value thereof, . . . ascertained in writing, the complainant shall have a right to receive double the amount, and, if not paid in one calendar month after demand, he shall have an action therefor with interest at 1 per cent. per month on this double amount. It is found in the present case that such an adjudication was made, but it is found that no notice of the time and place of assessing this amount, or valuation, was given to the defendant. The statute does not in terms require such a notice, but we think it does by reasonable and necessary implication. As a general rule and principle of justice, whenever persons are appointed to arbitrate and adjudicate upon the rights of others, some notice is to be given, to enable each party to state his claims and views, and adduce pertinent and proper proofs, and there seems to be a peculiar propriety in adhering to this rule, where the full amount of an actual indemnity is to be doubled by way of penalty. Where it is intended by the Legislature that referees, arbitrators, commissioners, or other like bodies, appointed to pass judgment upon the rights of others, shall have power to proceed *ex parte*, such an intent should be manifested in express terms, or by necessary implication. It was suggested in argument that this was analogous to the assessment of damages, after a default, which may be done without notice to the defendant. But the analogy does not hold; . . . as no such notice was given, and no opportunity afforded to the defendant to attend this assessment of the costs and expense of the fence, we think that he was not bound by it and that this action cannot be maintained.

In *Scofield v. Haire*, 122 Mich. 268 (80 N. W. 1092), a case involving the same question we have here under consideration, the Supreme Court of Michigan said:

It appears that the complainant was notified of the first meeting of the fence viewers. She appeared and protested against the proceedings. . . . This was on February 12, 1908. On the 21st day of June following, the fence viewers

met again, and made the following finding: 'We, the undersigned, . . . having heretofore, on complaint of Samuel L. Henry, examined that portion of the partition fence between the land occupied by him and Laura Scofield, respectively, in said township, and having determined the same to be out of repair and to require building, and having certified the same to the said Laura Scofield on the 12th day of February, 1908, and directing her to rebuild the same within ninety days from that date, and she . . . having neglected so to do, and the said Samuel L. Henry having, since the expiration of the last-mentioned time, rebuilt the same, we do, upon inspection thereof, adjudge the said fence so built . . . to be sufficient, and we do certify that we have ascertained the value of such rebuilding . . . to be the sum of $46\frac{12}{100}$ dollars.' This order was properly signed. The court below finds that no notice was given the complainant of this meeting of the fence viewers, and hence found that the finding was void. The record sustained this finding, and there was no error in the conclusion reached. The complainant was entitled to be heard on the question of the amount which Henry was entitled to receive.

In *McClay v. Clark*, 42 Minn. 363 (44 N. W. 255), the Supreme Court of Minnesota, in disposing of a question similar to the one we have here, said:

The defendant makes the further point that no notice of the final appraisement was given. There is no finding on this point, but it is of sufficient importance to notice. The duties of the supervisors, when acting as fence viewers, are judicial in their nature, and notice is necessary to give them jurisdiction to make an apportionment of a partition fence, and also to make an appraisal of the value of the same, . . . and without such notice the proceedings are void.

In the instant case, the power of the fence viewers was defined and limited by statute. The notice which they were required to give is defined by statute. The statute provides: "The fence viewers shall have power to determine any controversy arising under this chapter, upon giving five days' notice to the opposite party, prescribing the time and place

of meeting to hear and determine the *matter named in the notice.*”

There is no affirmative showing in the record as to what the contents of the first notice was. We have negative assurance, from the record, that the notice of the first hearing was sufficient to give the fence viewers jurisdiction to apportion the line fence between these parties, and to assign to each his part to build, and to fix the time in which it should be constructed. We take it from this record that this was the only purpose for which they were then called out. It is the only thing they did, or attempted to do. The defendant was required to build the fence within thirty days. If he did not build it within thirty days, the plaintiff had a right to construct it. No time was fixed, nor does the statute fix any time, in which the plaintiff could have availed himself of this right, upon default of defendant. It would be therefore impossible for the fence viewers, at the first meeting, to determine the time and place at which they would meet to assess the cost of construction, if constructed by the plaintiff, and to give notice thereof to the defendant before the fence was actually constructed. This negatives the idea that the first notice contained any matter advising the defendant that the trustees would meet, at any time and place, to assess the costs of the construction—the time of which was uncertain and indefinite and not determined. Therefore we must assume that the notice of the first meeting of the trustees was no notice of the meeting at which they attempted to assess the costs of constructing the fence.

The powers given to the trustees embrace essentially distinct actions which may be taken at different times, and for different purposes, looking to different objects. Where these matters can all be accomplished at one time and place of meeting, they may all be included in one notice, but the notice, to give jurisdiction, must embrace all the subjects included in the application and which can be disposed of under the application. The jurisdiction of the fence viewers is the most

limited kind, and its mode of procedure is defined by the statute. All the requirements of the statute are essential to jurisdiction, and so it follows that want of notice of the *intended action*, as in almost every judicial proceeding, is in this limited tribunal a fatal want of jurisdiction. The party is only bound, by the action of a court of this kind, in respect to *matters of which he had notice*.

In the *Rhode Island* case, *supra*, the Supreme Court of that state, having before it a similar question to the one here under consideration, said:

The statute provides: 'When any proprietor or possessor of land shall neglect or refuse to repair or rebuild any partition fence, . . . the aggrieved party may complain to any fence viewer of such town; . . . who, after due notice to such party, shall attend and view the same; and if he shall find said complaint to be true, he shall, in writing, require the delinquent party to repair or rebuild the same within such time as he shall therein appoint, not exceeding fifteen days.' To authorize any proceeding by the fence viewer, either to compel the party to build or repair, or to mulct him in damages for neglect, there must be a complaint that he has neglected or refused to rebuild or repair the partition fence; and upon that complaint, not upon some other, notice must be given to the party complained against that such complaint has been made, and of the time appointed by the fence viewer to view the fence; and, having given such notice, the fence viewer must adjudge the complaint so made to be true, and, if he find it to be true, he is to assign a time within which the party may still perform his duty by building. . . . If this order be not complied with, and the party still neglects, the complainant may rebuild or repair, and shall do it to the satisfaction of the fence viewer, who is to adjudge whether it is properly built. If satisfied upon this point, he is required to ascertain the cost of building, together with his own fees, and to give a certificate thereof to the complainant. No notice is in terms, required to be given to the delinquent party to be present, or to be heard upon the assessment of these damages against him; but, upon a similar statute in Massachusetts, . . . it has been held that the precepts of natural justice require

such notice, and that such notice is necessarily implied. . . . Having adjudged, then, upon notice to the delinquent party, what the cost of rebuilding has been, and having given to the complainant the certificate of the amount so adjudged, the complainant is authorized, but not until these several judgments upon notice have been made, to demand of the defendant the amount adjudged, and upon refusal by him to pay, to maintain a suit therefor. Now it does not appear from the certificate of the fence viewer that any complaint was made by the plaintiffs that the defendant had neglected or refused to repair the division fence; nor does it appear therefrom that any notice was given to the defendant that any such complaint was made against him, or that the fence viewer intended to view the fence, at any time, in order to determine if he had refused or neglected to rebuild or repair, nor has the fence viewer certified that he found any complaint against the defendant to be true, much less a complaint that he had neglected or refused to build the partition fence. Neither does it appear that before proceeding to ascertain the cost of the fence built by the plaintiffs, he gave any notice to the defendant that he might be heard in assessment of damages. If any one of these requisites be wanting, the plaintiffs cannot maintain their action, even though a regular demand were made upon the defendant, and on a day to which there could be no objection.

It is true, in the case at bar, that after the fence viewers had assessed the cost of constructing the fence, the plaintiff served notice on the defendant of that fact, and that he was

2. **SAME:** notice: required to pay the amount so assessed with
jurisdiction. the costs of the assessment. The defendant being a nonresident, the notice was served by publication, and in the following words, which was duly signed by the trustees:

To J. E. Davis: You are hereby notified that M. K. Pickerell under order, has built the north half of the fence between your farm and his, as ordered to be built by you, and the value has been fixed by the township trustees and the cost, and that the sum due said Pickerell for said fence and cost has been found, by the township trustees or fence viewers, to be \$62.88, and the cost of the notice provided by

law and clerk's fees amounting to \$7.00, total \$69.88 and you are required to pay the same within ten days from completed service of this notice or double damages will be claimed of you as provided by section 2358 of Code of Iowa. Take notice and govern yourself accordingly. The said Pickerell erected said fence as provided by the laws of Iowa, and you are required to make payments above set forth or you will be liable for the amount thereof in the sum of \$138.76.

This notice was served after the trustees had taken action at the instance of the plaintiff, and had made their finding and order and had fixed the amount which plaintiff was required to pay for the fence, and could not, and did not, relate back to give them jurisdiction to make the order and fix the amount on which, and for which, this suit is brought.

An examination of this record satisfies us that the trial court was right in its first ruling, and in sustaining defendant's motion for a directed verdict, and in directing a verdict for the defendant, and in entering judgment for the defendant on the verdict, and that the court erred in setting aside its order and judgment and in granting a new trial, and for this reason the cause should be reversed, and it is—*Reversed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

S. W. FARMER, Appellant v. H. N. UNDERWOOD ET AL.,
Appellees.

Personal services: COMPENSATION: BURDEN OF PROOF: EVIDENCE. Ordinarily the law implies a promise to pay for services rendered, but if the servant renders the service as a member of the family of the other and receives support as a relative, the presumption is that such service was gratuitous, in the absence of any express or implied agreement to pay therefor; and the burden is upon the one performing the service under such circumstances to show a mutual expectation of compensation therefor. In the present

case the evidence was insufficient to show any agreement or understanding that plaintiff, a son-in-law of defendant and whose family resided with the defendant, was to receive compensation for the services rendered, or to show a mutual expectation that plaintiff should receive compensation.

Accounting: PRESUMPTION: MATTERS INVOLVED. Where there was an
2 accounting between the owner and a cropper of land, which involved the dealings of the parties, it will be presumed that all claims between the parties were settled, including a claim for services upon the farm, in the absence of an affirmative showing otherwise.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

TUESDAY, MARCH 24, 1914.

ACTION to recover for services rendered by the plaintiff to the defendant. Defense, that the plaintiff was, at the time the services were rendered, a member of defendant's family, residing therein with his wife and children, and receiving support from the defendant as a member of his family; and that there was no express promise to pay, and no circumstances shown which would negative the conclusion, from the relationship, that the services were gratuitous. Judgment for the defendant. Plaintiff appeals.—*Affirmed.*

S. B. Allen, for appellant.

Parsons & Mills, for appellees.

GAYNOR, J.—The plaintiff claims: That from the 1st day of October, 1899, up to and including the 18th day of November, 1905, at the instance and request of the defendant, he performed work, labor, and services for the defendant as a general farm hand. That he worked in all for the defendant, as such, for forty-four months and eighteen days; that the services so rendered were reasonably worth \$1,117.34, on

which the following credits should be allowed: July, 1903, \$5; August 12, 1905, \$10. That, after allowing such credits, there is due him from the defendant the sum of \$1,102.34, and for this he seeks judgment. The defendant, for answer, denies all the allegations of the plaintiff, and further alleges, as a defense to plaintiff's claim, that the plaintiff was a member of defendant's family; that he was a son-in-law of defendant; that he, together with his wife and children, lived with defendant as a member of defendant's family, during all the time for which he claims compensation for services; and that it was understood that the labor performed, if any, was gratuitous. Defendant, further answering, says that all the matters of account and other matters, if any existed, between plaintiff and defendant, have been heretofore fully settled and adjusted; that, prior to the commencement of this action, the plaintiff brought a suit against the defendant in Polk district court, and there was an adjudication between the plaintiff and defendant of all matters then existing between them in which one had any claim against the other. Defendant further says that in the fall of 1906 he had a full settlement with plaintiff for all labor done by the plaintiff up to that time. The plaintiff, for reply, denies all the affirmative matter set up by the defendant in its answer; alleges that the settlement referred to was made with reference to distinct matters, and in no way involved the matters herein in controversy. Upon the issues thus tendered, the cause was tried to the court and jury, and at the conclusion of all the testimony, on the motion of the defendant, the court directed the jury to return a verdict for the defendant, which being done and judgment having been entered upon the verdict, the plaintiff appeals.

Appellant assigns six errors. The first five may be grouped under one head, to wit: (1) The court erred in sustaining the motion of the defendant to direct a verdict for the defendant, on the ground that the services were rendered by the plaintiff to the defendant, as a member of defendant's

family, and that there was no evidence of an expressed contract for payment, and no sufficient evidence showing an expectation on the part of the plaintiff to receive pay, and no expectation on the part of the defendant to pay for such services. (2) The court erred in finding that there was a settlement between the parties of all matters involved in this suit for which plaintiff might, at the time of the settlement, have had a claim against the defendant.

The evidence tends to show that the plaintiff, at the time of the happening of the matters hereon sued for, was the son-in-law of the defendant; that, prior to his coming to live

with the defendant, he lived at Prairie City;

1. PERSONAL
SERVICES: com-
pensation: bur-
den of proof:
evidence.

that he married plaintiff's daughter in 1897;

that along about the 1st of October, 1899, he,

with his wife and two children, came to live

with the defendant; that at that time the defendant was occupying a farm of about 200 acres and was engaged in general farming; that plaintiff and his family came to live with the defendant, at the request of plaintiff's wife; that her mother was in very poor health; that she wanted to go and make her home with her father and mother; that, because of the wife's solicitude for her mother and desire to live in her home, plaintiff sold out his business at Prairie City and took his family to live with the defendant. Plaintiff claims that he worked for the defendant continuously from October, 1899, to March 1, 1900, about five months; that he quit then and went away, leaving his family with the defendant. He came back about the 1st of May and then worked for the defendant, milking cows and cutting wood and all kinds of farm work, until about November, 1900; that he then left and did not return until about the 1st of February, 1901; that he then stayed and worked for the defendant until about the 1st of March, 1903, at which time he came back to the farm; that, during his absence this time, he rented a house in town and stayed in town during the summer; that he came back to defendant's about July 1, 1903, and worked on the farm; that

he continued to work until about the 18th of December, 1904, and then went to Oklahoma; that he came back about April, 1905, and stayed there until November 18th of that year and did work on and about the farm.

Plaintiff testifies: That during the month of August, in 1905, not having any money from Mr. Underwood, he thought he needed a little pocket money. Because of that, he contemplated going up into Minnesota to harvest. That, when defendant heard he was going away, "he said, 'If you want to work, you can work right on here, and I will give you \$25 a month.' So I stayed and worked then, but he never paid me any money except \$10 paid that day. Prior to this time, he had never fixed any price upon the services." During all this time that plaintiff was with the defendant, the plaintiff says he never had any dealings with the defendant that had anything to do with the labor performed by him upon the farm. It appears that during all the time, while plaintiff was there and during his absence, plaintiff's wife and children remained with the defendant and were cared for by him; that during the years up to the 12th of August, 1905, nothing was said between the plaintiff and the defendant as to wages.

It affirmatively appears that there was no express agreement or understanding between the plaintiff and defendant that the plaintiff should charge for his services, or that the defendant should pay him therefor, up to August, 1905; that the first talk had between them, touching compensation for services rendered, was in August, 1905, and this talk, as we interpret it, related only to future services to be rendered. At least, this is the apparent understanding of the defendant at that time. It is not claimed by the defendant that this talk of August, 1905, referred to, or had any relationship to, any services theretofore rendered by the plaintiff, and we are satisfied that such a claim, if made, would not be justified by what was said and done at that time, under the circumstances under which the conversation was carried on. It appears from this record that the plaintiff came and went and returned

as he pleased; that he rendered such services as to him seemed proper while with the defendant; that the defendant, in no way, assumed to direct or control his conduct, as to when he should go, when he should return, or as to what he should do when present on the farm. There is absolutely nothing to indicate that the defendant, at any time, understood that the plaintiff was working for him in expectation of remuneration. There is nothing to indicate that the defendant did not understand that plaintiff was there with his family, as a member of defendant's family, receiving support for himself and family, and that the services rendered by him were rendered in that capacity. It is true that the plaintiff claims that he expected compensation and that he kept a memorandum of the services rendered for defendant, which he claims he lost and was not able to produce upon the trial.

It is plain from this record that the plaintiff and his family, his wife and children, lived with the defendant as a member of defendant's family; that that relationship was established and continued during all the time covered by plaintiff's claim; that they received support from defendant during all this time; that there was no promise, or agreement, or understanding expressed between them as to any compensation to be given plaintiff for his services. If therefore the plaintiff is entitled to recover for any services rendered up to August, 1905, it must be by reason of an implication of law that the services were to be paid for, arising from such a condition of facts that it is apparent therefrom that the plaintiff intended to charge for his services during that time, and the defendant intended to pay him therefor.

It is a significant fact, in this case, that during all this time plaintiff made no claim for compensation; that he came and went as he pleased; that the defendant assumed no right to direct his coming and his going, or the character or kind of services which he should render. It is not sufficient for plaintiff to show that he had a secret intent to charge for his services. The evidence must go further and disclose a mutual

purpose and intent of the parties, touching the services rendered. That is, it must disclose an intent, on the part of each, that the service rendered should be paid for, before the presumption that the services were gratuitously rendered, under such conditions, is overcome.

In *Scully v. Scully*, 28 Iowa, 548, this court, speaking through Judge Cole, in a case involving the question here under consideration, said: "Ordinarily and without more, where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor. But where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein, either as child, a relative, or a visitor, a presumption of law arises that such services were gratuitous; and, in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation therefor." This doctrine has found such substantial lodgement in the jurisprudence of this state and has been so consistently followed that the citation of further authority for this rule is unnecessary.

It appearing from the testimony in this case, without dispute, that the plaintiff was, at the time he claims these services were rendered, a member of defendant's family, residing therein with his own family, and receiving support as such, that no recovery can be had unless it affirmatively appears, either that there was an express contract to pay for the services rendered, or that the services were rendered under such circumstances as negatives the conclusion that they were gratuitously rendered, and affirmatively shows that there was a mutual expectation between the plaintiff and defendant that one should receive, and the other should pay, for such services as were rendered. The burden is on the plaintiff to establish this state of facts, and we think that he has wholly failed

to do this and to carry his burden to a successful issue, and that there was no error of the court in sustaining defendant's motion for a directed verdict upon this issue.

It appears, however, that in August, 1905, there was an express agreement to pay for services to be rendered thereafter by the plaintiff; that services were rendered, and this the plaintiff would be entitled to recover for, unless the defendant has affirmatively shown that there was a settlement, in which this sum was included, as claimed by the defendant. It appears that after the 18th day of November, 1905, a controversy arose between the plaintiff and defendant touching the division of profits in certain land. It appears that certain other dealings were had between the parties concerning the loaning of money and the purchase of grain, and that these matters were discussed and talked of prior to any settlement; that thereafter the plaintiff commenced an action against the defendant to recover what he claimed as his share of the profits in the land deal. Defendant filed an answer setting up certain matters and asking that an accounting be had, between the plaintiff and defendant, of all matters then in dispute between them, or unsettled; that thereupon the cause was transferred to equity, and the trial was had and a judgment entered.

Now it is apparent from this record that each party asserted then, against the other, all claims which he had and might insist on, in the adjustment of their mutual accounts, and it was the intention of both parties to adjust all their mutual accounts, and we feel that the record shows that such was not only the intention, but that it was actually done at that time, and, without setting out the record in this opinion, we are satisfied that as to this balance there was, prior to the commencement of this action, a mutual settlement and adjustment of all claims held by each against the other, and this done without any fraud, mistake, or concealment, which might avoid such settlement.

We are satisfied the court did not err in holding that

this matter was settled and adjusted between the parties, for the reason that, when the cause was transferred to equity, it was done, not for the purpose alone of determining what was due the plaintiff for his half interest in the farm, or his half interest in the profits, but also for adjusting and settling all other matters then pending between them. At least, in such an accounting as was had, the presumption is that all claims between the parties were then settled and adjusted, unless the contrary affirmatively appears, and it does not so affirmatively appear.

We find no reversible error, and the cause is—*Affirmed*.

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

WILLIAM LEUPOLD, Appellee, v. SOPHIA LEUPOLD, Appellant.

Divorce: INHUMAN TREATMENT: ADULTERY: EVIDENCE. In this action for divorce on the ground of cruel and inhuman treatment and of adultery on the part of the wife, the evidence is reviewed and held sufficient to support both charges and to entitle the husband to a decree.

Same: ADULTERY. The fact that adultery is a crime usually committed in secrecy and therefore difficult of direct proof will not preclude a conclusion of guilt, when the facts and circumstances relied upon are consistent with such conclusion and inconsistent with the idea of innocence.

Same: DECREE. The decree awarding to each of the parties the property held by them in their own right, without alimony, and the care of the minor child to the mother for part of the time provided she conducts herself properly, with an allowance for the support of the child while in her care, is held to be equitable.

Appeal from Emmet District Court.—HON. A. D. BAILIE,
Judge.

TUESDAY, MARCH 24, 1914.

PROCEEDING for divorce upon the grounds of cruel and inhuman treatment and adultery. Decree was entered in

favor of plaintiff, and appeal is taken by the defendant.—
Affirmed.

W. A. Ladd and N. J. Lee and Kenyon, Kelleher & O'Connor, for appellant.

J. W. Morse and E. A. Morling, for appellee.

WITHROW, J.—I. This is a proceeding for a divorce tried upon the issues raised by the charge, in the petition of the husband, of cruel and inhuman treatment by the wife, a like charge of cruel and inhuman treatment made by the wife against her husband in a cross-petition, and the charge of adultery by the wife with one Fred Ruckman, made in an amendment to the petition, which was filed after the answer and cross-petition. The trial court found that the charges in the petition and its amendment were sustained, and granted plaintiff a decree; it also awarded to the parties the property then held by each, and made provision for the education and custody of the minor child, Myrtle. From the decree so entered the defendant, the wife, appeals.

II. The case presented is wholly of fact. The original transcript of the evidence is before us, and we have given to it careful consideration. Plaintiff and defendant were

1. DIVORCE: in-
human treat-
ment: adultery:
evidence. married in 1893, and for eleven years pre-
ceding the trial had lived in Emmet county.

A part of this time their residence had been on a farm owned by them, and for a short period their home had been in Estherville, the farm having been rented and occupied by one Peter Fank. Fred Ruckman, with whom the wife is charged with having committed adultery, is a cousin of William Leupold, the plaintiff and appellee. The Leupolds had lived in Illinois before coming to Emmet county, and Ruckman knew them there. Ruckman was the owner of an eighty-acre farm lying near that of appellants in Emmet county, and was unmarried. Leupold was in poor health. In

1906 he went to Rochester, Minn., for surgical treatment, and during his absence Ruckman was at the home for the purpose of taking care of the chores. In the winter of 1906 Leupold arranged to go to Kansas to spend the winter, seeking relief from asthma. Before going, as he testifies, he wanted to get one Insley to do the work about the farm, as he lived across the road and was convenient, but Mrs. Leupold expressed a desire that Ruckman should be employed for that purpose, and the husband thereupon employed him to do the winter chores during his absence, at \$10 per month. Prior to the first winter of his absence on account of his health, while the domestic relations of the parties had not been entirely free from discord, there had been a course of life in their home which presented no acute conditions so far as affected the relations of husband and wife and their confidence in each other. But following that absence, and arising, no doubt, from her association in the home with Ruckman, it is quite clear that upon his return from the west Leupold was not welcome in his own home, and it also is clear that there had arisen between Ruckman and Mrs. Leupold feelings of sympathy in likes and purposes which made their association congenial. The appellee noticed in different ways the change in his wife's conduct towards him, and dates from that winter her refusal to occupy the same room with him, although, as we conclude from the record, there was not an absolute denial of marital rights, but they were unwillingly granted. In the winter of 1908-09 Leupold was again absent, and although as claimed by him he had arranged with another man to stay and look after the chores, Ruckman was at the home during the greater part of his absence, and this also was the case in the winter of 1909-10, when the appellant was again in Kansas. In 1910-11 the home was in Estherville. In the fall of 1911 Leupold went to Wyoming, first having arranged with one Fank to do the necessary chores, and, as he claims, stating to his wife that he did not want Ruckman there at all, but this request did not have the effect desired. During the period

when appellee was at his home after these absences, the dislike and indifference of his wife to him was marked, growing as the time went on, as the association between Mrs. Leupold and Ruckman was continued. If the appellee had occasion to distrust the fidelity of his wife, he refrained from openly declaring it, but sought by different means to bring about such a state of family life as would permit the maintenance of the home and the care of the minor daughter. We will not in detail go into the evidence upon this point, but the entire record abundantly shows that Mrs. Leupold transferred her affections to Ruckman, and that they were pleased and satisfied with the society of each other; that they were often alone together, and, especially during the absence of the husband their intimacies were such as to often occasion comment. Indeed, at times when he was present their conduct towards each other was such as to create in him feelings which had expression in remonstrance. With this state of the relations between the appellant and Ruckman satisfactorily appearing from the evidence, we turn to that which bears upon the charge of adulterous conduct.

III. A witness, Josie Fank, testified that during the summer of 1911, with her brother, she went to the Leupold home. Ruckman's automobile was standing in the front yard. She went to the kitchen door and knocked, but there was no response. Waiting for a few moments she again knocked, when the door was unlocked or unfastened, and she went in. Mrs. Leupold came to the door, barefooted, and wearing a sack apron without sleeves. The witness testified that she remained in the house for about a half an hour, and that Mrs. Leupold told her Ruckman was there on the bed in another room, resting. At one time Ruckman called to Mrs. Leupold, and asked her when she would be ready to go to town, but did not come out of the bedroom while the witness remained. The appellant claims that there was no improper conduct between herself and Ruckman, and that he was only resting, as he often did when there. The witness, Miss Fank, is to

some extent corroborated by her brother as to the fact of her knocking at the door and receiving no response at first, and he also testified that the curtains to the windows were down. Why the door should be closed and curtains down on a day in June, with the house occupied, is not satisfactorily explained.

Another instance related is by a witness, Mrs. Warner. She testified that she was at the home one time during a winter when Leupold was away, and when Ruckman was staying there. The women visited for a short time, and then upon the request of Mrs. Leupold they went upstairs together that the visit might be continued while the beds were made. Mrs. Leupold said she was going to make Ruckman's bed, and Mrs. Warner went in the room with her. She testified that she saw in the bed a bunch of black combing hair, in a knot, which looked as if it had been fastened on the end of a braid, the way women use their loose hair for that purpose. No comment was then made upon it. The appellant denied that she ever had occupied the room with Ruckman, or that any other woman had done so. The same witness testified that on one occasion Mrs. Leupold told her that her husband, Leupold, was "no good."

Henry Leupold, father of appellee, testified that he lived at the home of his son in Estherville in 1911 for a period of about six weeks. An incident which he claimed occurred while he was there he describes as follows:

One day when I went home just a little before noon I saw Fred Ruckman there. I know Fred Ruckman. I think it was in February. I usually went around to the kitchen door; this day I went to the kitchen door where I always went; I went by Mrs. Leupold's bedroom where she slept; her little girl slept with her. It was icy on the sidewalk, and I walked close to the house. I went by the windows of the bedroom, the window that is right near the outside kitchen door. When I got to the kitchen door, I tried to open it, and it was locked or blocked, and I could not get in; I passed that bedroom, and it was partly drawn, the curtains were

drawn on every window in the house. When I got to the kitchen I heard Mr. Fred Ruckman and Mrs. Leupold talking in the bedroom; I was passing right by that window close to the house. I heard them talking and laughing in the bedroom, the two of them. The bottom of the window was about two and one-half feet from the ground, maybe three; I didn't measure it. Her bed was right near the window. It was in a kind of a low tone. When I rattled at the door they hushed. I heard this laughing and talking and the rattle of the bed; that is all. The sounds were right near the bed and on the bed. I could not have heard if they were further away. The sounds were of people close together. I knew both of their voices. I walked back on the other side of the house to see if the door was open, and that was locked, the door on the opposite side of the house; then I walked back again until I got to the kitchen door, the same path I went before. When I came there the second time I seen Fred Ruckman come out of the kitchen door, and he appeared to be in a hurry. I said, 'Good morning,' and he appeared to be in a hurry and he passed me. He said he was in a hurry. He looked blushing. He was red in the face, he put his face down, his eyes were cast down. The door was open, and I walked into the kitchen. As I entered the kitchen, Mrs. Leupold, I heard her come out of the bedroom into the dining room, and enter into the kitchen because the door in the bedroom squeaks; she walks pretty heavy, and I heard her steps; she just opened the kitchen door when I entered the kitchen. She was red-looking, and she blushed a little, too. There was a change in her conduct toward me after that, and I saw by her actions that I was not wanted there any longer much. My son at that time was at Gruver on some business.

The cross-examination of this witness did not materially affect the statements which we have quoted as his testimony, although question was raised as to whether, with closed windows, he could have heard what he claimed. He also testified that after entering the house he passed through the bedroom, and the bed appeared the same as when slept in. Whether it had been made up that morning he did not know. Minimizing his testimony to the extent which is proper because of

interest shown by him, and his earnestness as a witness, there yet remains of it much which has not satisfactory explanation in this record. We think the presence of the two in the bedroom at the time is satisfactorily shown. Ruckman left the house as the witness entered, and immediately Mrs. Leupold came from the bedroom; and, while these facts alone do not show the act of adultery, they are circumstances which, in the light of the previous relations of the parties point strongly in that direction.

Another incident given is of a time, July 4, 1911, when all the parties, Mr. and Mrs. Leupold and their little daughter, Ruckman, and others had gone to Spirit Lake for an outing. During the day Mrs. Leupold and Ruckman were frequently together. That evening Leupold returned home with his little daughter, the wife and mother remaining at Spirit Lake. She testified that she intended to spend the night with a woman friend but instead stayed with a woman whom she met on the boat, a stranger to her, and whose name she did not remember. She testified that she did not see Ruckman that night. Ruckman testified that he stayed at a hotel that night with a man named Fitzgerald, a tile ditcher, who was not a witness on the trial, and that he did not return to Estherville with Mrs. Leupold.

These various instances all are of a most suspicious nature, and because of the known intimacy of the parties, and the manifest dislike which the wife held towards her husband, called for explanation. Her testimony upon these questions, while ultimately reaching a flat denial of anything like improper relations, was, in many instances before arriving at that point, halting and indefinite, and in one instance, when speaking of the suggestion by counsel that she had at a particular time occupied a bed with Ruckman her answer was "I don't remember." It is not possible for one whose life has been pure to be forgetful as to that which is in absolute contradiction of her purity, if there was that which in fact contradicted it. Nor can we realize how the mind could for

an instant waver or be forgetful in rebutting by emphatic answer a suggestion of that nature, if there was not basis for it. It is true that later in her examination her denial was direct and unequivocal; but her manner of answering, as disclosed by the record, bore heavily against her credibility. The same should also be said of the testimony of Ruckman. Other incidents appear in the record, tending strongly to support the claim of the intimate relations between the parties, that is, as to their being together and alone, her continued contempt for her husband, her strong and willful disposition, his known desire that such intimate relations should cease, and the persistent disregard of such desire shown by both the appellant and Ruckman. The appellee testified that he first learned of the incidents upon which the claim of adultery is based during the summer after the commencement of this action, and that he had a talk with his wife at the home of a neighbor, and accused her of adultery with Ruckman, and that she admitted having had such relations, and that thereafter he amended his petition to include the charge. She denies wholly having made such admissions to him. She does admit having written a warning to Fred Ruckman, upon the bottom of a letter written him by one Nina Hornby. She stated she was in fear for herself and for him because of threats made by her husband in 1912, which was after the time he claimed to have obtained knowledge of their adulterous relations.

The act of adultery is peculiarly one of secrecy, and seldom can be proven by evidence directly showing it. The difficulty in proving it is not, however, reason for not per-

mitting a conclusion from circumstances that
2. **SAME: adultery.** such an act was committed, when the facts and circumstances so relied upon are consistent with such conclusion, and inconsistent with innocence. Realizing the effect which a finding of adultery must have upon the reputation and future life of the one accused, guarding an investigation of the evidence with a care which should be extreme in

such cases, that injustice may not be done, but charged with the duty, under such conditions, of finding the truth so far as it is ascertainable from the record, regardless of the effect which it may have upon the unfortunate litigants, we are brought to the conclusion that the record in this case gives full support to the findings reached by the trial court. The witnesses were all before that tribunal. The presiding judge heard their testimony and saw their demeanor; and, while this latter element cannot be presented to us in the printed pages which serve to submit this cause to this court, there appears throughout the record facts and circumstances attending the presentation of the evidence which to us leave strong impressions as to what was and was not credible testimony in the case.

IV. The record shows that the wife was possessed of considerable property in her own right, and that her husband also had land and property. The trial court made to appellant no allowance as alimony. Under the finding
3. SAME: decree. she was entitled to none; but it awarded to her that which already was hers, or to which she held the legal title; the decree confirmed in each the title to the property respectively held by them.

The future care of the minor child was provided for, a part of the time with the mother, six months of each year, provided she should desist from any and all improper or unseemly relationship with Ruckman, and that while with the mother the sum of \$300 per year was provided to be paid by the father during the minority of the child, unless the mother, by disregarding the prohibition of the decree, should forfeit her right to such custody.

The provisions of the decree as to such matter seem to us to be equitable, and it is in all respects—*Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

HIGH CONN and DAVID CONN, Appellees, v. F. W. CONVERSE,
Appellant.

Appeal: REVIEW OF COURT FINDINGS. Where the evidence upon material issues in an equity case was conflicting, the findings of the trial court who saw and heard the witnesses will be given some weight by the appellate court.

Payment by mistake: RECOVERY: LACHES. Where plaintiff brought his action to recover money paid through oversight or mistake, within a reasonable time after discovery of the mistake, he was not barred of relief on the ground of laches.

Same: MUTUALITY OF MISTAKE: EVIDENCE. To recover money paid by mutual mistake it must appear by clear and satisfactory evidence that the mistake was mutual, as distinguished from an unilateral error.

Appeal from Emmet District Court.—HON. D. F. COYLE,
Judge.

TUESDAY, MARCH 24, 1914.

ACTION to recover a sum of money paid by plaintiffs to defendant on a real estate transaction through an alleged oversight and mutual mistake. The defendant denied the alleged mistake, and pleaded a counterclaim. The trial court awarded to plaintiffs the amount claimed, and one item of defendant's counterclaim, and, from the decree, defendant appeals.—*Affirmed.*

W. A. Ladd and N. J. Lee, for appellant.

P. H. Paulson and D. G. Baker, for appellees.

DEEMER, J.—I. Save one, the questions involved are purely of fact, and, as the trial court saw and heard all of

the witnesses, its finding will be given some force because of a direct conflict in the testimony on some

1. **APPEAL:** review of court findings. material issues in the case. *Berry v. Berry*, 115 Iowa, 543; *Fulton v. Fisher*, 151 Iowa, 429; *Sargent v. Owen*, 134 Iowa, 365.

II. The legal proposition involved is the question of plaintiffs' laches in bringing suit. As they commenced their action within a reasonable time after discovering the mistake, they should not be barred of relief on this ground. This is a familiar doctrine, supported by all the authorities. See collection of cases in 16 Cyc. 158.

2. **PAYMENT BY MISTAKE:** recovery: laches. also be shown that the mistake was a mutual
3. **SAME:** mutuality of mistake: evidence. as distinguished from an unilateral one. *Tufts v. Larned*, 27 Iowa, 330; *Wachendorf v. Lancaster*, 61 Iowa, 509; *Jurgensen v. Carlsen*, 97 Iowa, 627.

III. The plaintiffs were required to establish the mistake pleaded by them by clear and satisfactory proof, and it must also be shown that the mistake was a mutual as distinguished from an unilateral one. *Tufts v. Larned*, 27 Iowa, 330; *Wachendorf v. Lancaster*, 61 Iowa, 509; *Jurgensen v. Carlsen*, 97 Iowa, 627.

The trial court recognized these rules, and, in an opinion filed by him, it is indicated that he gave the case a great deal of consideration, and was abidingly convinced of the truth of the plaintiffs' claims. We have gone over the testimony with care, and are of the same opinion. It would subserve no useful purpose to set out either the testimony or the ultimate facts. Suffice it to say we think plaintiffs made out their case; and that by the same quantity of testimony defendant established the one item of his counterclaim.

It follows that the decree must be and it is—*Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

DANIEL BRAUSE, Appellee, v. FAYETTE COUNTY, Defendant;
OLAF HAUG, CELIA HAUG and CHRISTIAN MEYER, Defendants and Appellants.

Boundaries: **LOCATION:** **EVIDENCE.** In this action to determine a disputed boundary line the evidence is reviewed and held to show that a highway, as actually located, was on a line designated by the measurements and monuments made by the original surveyor, and was not on a midsection line between the lands of plaintiff and defendant, as called for by the field notes.

Same. Where a highway was located and established according to the actual stakes and monuments as fixed by the original survey, that location will govern where a dispute arises from a conflict between such monuments and the field notes.

Appeal from Fayette District Court.—HON. A. N. HOBSON,
Judge.

TUESDAY, MARCH 24, 1914.

PROCEEDING in equity for injunction to restrain defendants other than Fayette County from obstructing a highway. From a decree in favor of plaintiffs, and Fayette County on its cross-petition, the other defendants appeal.—*Reversed and Remanded.*

Ainsworth & Hughes and *D. D. Murphy*, for appellants.

E. H. Estey and *E. E. Hasner*, for appellee, Brause.

W. C. Lewis, for Fayette County, defendant and appellee.

WITHROW, J.—I. The plaintiff and the defendants Haug are the owners of real estate in Fayette county situated in the

N. E. $\frac{1}{4}$ of section 15 of township 94. Separating parts of their holdings is a public highway. The dispute between the parties is as to the true location of the highway, as upon that depends their respective east and west lines bordering on the highway. Fayette county was made a party defendant. It is the claim of the plaintiff that the highway was established forty feet in width on the line between the E. $\frac{1}{2}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 15, and that the defendants, other than Fayette county, have so built their fences as to obstruct the highway, and especially damage the plaintiff's property lying west of the highway. He claims that when the road was commenced to be used it was not known definitely where the middle line of section 15 was located; west of the highway was timber land, and the fences erected as highway boundaries were cheap and irregular. It also is claimed: That in 1904 the then adjacent owners caused a survey to be made to determine the true line of the highway, which showed that defendant's fences encroached upon the highway for the greater part of its width; and it was orally agreed that fences would be built to conform to the line as thus determined. That another survey was made in 1910 for a like purpose, with the agreement that fences should be placed upon the line so found; and the survey of 1910 confirmed that which was made in 1907. That acting upon said agreement and survey the plaintiff and his immediate grantors did make a new fence to conform to the lines so run, but the defendants refused to carry out their agreement. An estoppel is pleaded against the defendants. An injunction was asked restraining the defendants from interfering with plaintiff's right to maintain his fence at the place claimed by him as the true line. The defendants Haug and Meyer claim that, when the property now owned by Haug was purchased by his grantor, Meyer, it was inclosed by fences, that along the line of the highway in dispute being pointed out as the west boundary, and that it was so occupied and used from the time of his purchase in 1892 down to the conveyance by him to Celia Haug in 1911,

and since that time by her; that the line thus pointed out had for a period of more than twenty-five years been continuously acquiesced in by the owners of the land to the west. By cross-petition Fayette county pleads the establishment of the highway in question that it was so established on the line between the E. $\frac{1}{2}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 15, and that defendants Haug and Meyer now obstruct the same by their fences. It asked the establishing of the highway on the midsection line and for removal of the defendant's fences. The answer of the defendants to the cross-petition avers that the road in dispute which is designated as Smith's relocation No. 478 of the Frisbie road No. 391 was actually and practically located and opened where the same is now located, and that the same has ever since been so located and traveled, and that it was and is on the survey of the road made at the time of its opening. The trial court found that the road had been established on the midsection line as claimed by the plaintiff, that the defendants Haug were obstructing it, and permanently enjoined them from further so doing. From this decree the defendants Olaf Haug, Celia Haug, and Christian Meyer appeal.

II. The real question presented is: What is the true and controlling location of the highway?

Frisbie road, No. 391, was established by the board of supervisors of Fayette county in 1877, in accordance with plat and field notes which were made a part of the permanent records of the county. In 1882 the board established Smith's relocation of a part of the Frisbie road; the new location being a southerly continuation of the Frisbie road from a point where it had by angle turned to the east. The field notes of the original Frisbie road stated that upon reaching an angle post, which was definitely given as at a point indicated by given measurement, it from thence ran north on a division line of the N. E. $\frac{1}{4}$ of section 15 and the S. E. $\frac{1}{4}$ of section 10. The field notes for the Smith relocation ran a line to the west

1. BOUNDARIES:
location: evidence.

until reaching the midsection line between the S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ from "red oak twelve inches" bears north to an angle post marking the line in the old Frisbie road. Following such actions fences were build by adjoining owners, that on the west side being of wire, in places fastened to trees, it being through a wooded section; and, as appears from the evidence, the fences as then built, continuously from that time marked the respective east and west lines of the highway, there being no question or dispute concerning them until at or near the time of recent surveys made by adjoining proprietors to determine their property lines. It may also be fairly concluded from the evidence that the highway as thus visibly marked and used did not accurately follow the midsection line; as to this there is no substantial dispute, but whether it in fact was in accordance with monuments fixed or recognized in marking the surveys is the subject of sharp controversy.

The surveyor who at the request of owners ran the lines in 1910 stated that he did not find the center of section 15 marked by any permanent or recognized monument, and that point was determined by him by running lines from other monuments. He stated that it was obvious that the middle of the road as traveled did not coincide with the line which he ran; that it corresponded with his survey for a distance of about 20 chains from the north line of the section, and then deflected to the west, and this variance is the producing cause of that which is the subject of controversy.

The preceding survey of 1904, also made at the instance of owners of land in section 15, was made by one Belknap, who was at the time county surveyor, and he also was present when the survey of 1910 was made. He testified that he did not attempt to locate the witness trees designated in the field notes of the road survey, but that such attempt was made in the survey of 1910. He also testified that a tree was found that "was possibly a witness tree to that point if one used the center line of the road as then traveled. The location of

this tree would correspond to the location of the witness tree given in the field notes of the road, and, if this tree was used as a witness tree for that survey, the center of the line of the highway would be about with the center line as then fenced and traveled, and would be west of the center line of the N. E. $\frac{1}{4}$ of section 15." He also testified that on this tree there was a blaze, or a scar caused by a blaze, made at some previous time, indicating that it was a witness tree; that they chopped into the tree and discovered the old blaze, and there located the tree from the field notes of the road.

Mr. Simonson, who made the survey of 1910, testified that he saw a tree which he thought to be a witness in connection with the road survey, drawing his impression from the field notes and the character of the tree.

This evidence when taken in connection with the clearly established fact that the road as fenced and used for more than a quarter of a century, was on a line in harmony with it, when taken as a witness tree, and that its location was by measurements based upon the early road survey found to be at the place where a witness tree was then located, we think clearly shows that the road as actually fenced and recognized was on the line designated by the measurements and monuments of the surveyor; but was not, at the place in dispute, along the midsection line, although it followed that line through the N. $\frac{1}{2}$ of the section.

III. We first inquire as to what is the true location of the highway. As applied to streets, this court held in *Tomlinson v. Golden*, 157 Iowa, 237, that where

2. ~~SAME.~~ stakes were fixed as monuments in the original survey, and a conflict existed between such monuments and the field notes and plat as recorded, the survey upon the ground as ascertained by the monuments is controlling. In *Bridges v. Town of Grandview*, 158 Iowa, 402, in which arose the question of rights when the original boundaries or monuments had been lost, the rule was recognized that under such conditions the court was justified

in acting upon the testimony of those who built fences and erected improvements when the true lines were known or fresh in the minds of those who built and improved with reference to them. While that case does not wholly apply to the questions we now consider, for in this instance there is evidence as to one monument based upon which the original fence lines were properly placed, yet it gives proper weight to what had been done by adjacent owners with reference to established lines and monuments, and to that extent has strong application here. *Klinkefus v. Vanmeter*, 122 Iowa, 412, a case involving a dispute between property owners whose lands were separated by an intervening highway, recognizes, although does not directly decide, that the visible monuments will control as against recorded plats and field notes. These cases are clearly distinguishable from *State v. Welpton*, 34 Iowa, 145; *Grube v. Wells*, 34 Iowa, 148; *State v. Gould*, 40 Iowa, 372, and other cases presenting like questions, in that they involved the rights of adjacent owners with reference to the true line; no question arising as to the relative importance of a recorded plat and discoverable monuments. We conclude that under the facts it must be determined that the highway as originally laid out, fenced, and continuously used was the practical location of the road, and as such would control as against subsequent surveys which, when applied to the recorded plat in its recitation of the midsection line, would fix a line different from that actually laid out. The rule thus stated also has recognition in *Quinn v. Baage*, 138 Iowa, 437.

So finding, it follows that the rule as to rights acquired by acquiescence has no necessary application to the case, as the fences maintained by the respective owners and their grantors were as originally located and did not constitute an invasion of a private right.

We therefore reach the conclusion that the appellee had not the right to have the highway recognized and established at the place in dispute upon what the later surveyors found to

be the middle line dividing the N. E. $\frac{1}{4}$ of section 15; that the defendants, appellants, are entitled to a decree holding them not to have been trespassers, or to have obstructed the highway; and that the injunction should be dissolved.

The cause is remanded for a decree in conformity with this opinion.—*Reversed and Remanded.*

LADD, C. J., and DEEMER and GAYNOR, JJ., concurring.

NELLIE M. MURRAY, ADMINISTRATRIX OF THE ESTATE OF
CHARLES R. MURRAY, DECEASED, Appellant, v. M. H.
DALEY, Appellee.

Master and servant: PERSONAL INJURY: EVIDENCE. In this action for
1 injury to a workman while brushing the shavings away from the
knives of a planer with which he was at work, evidence that in
putting a long timber through the machine it was necessary that
it go over the knives at an angle, was admissible as tending to
show that more shavings were thus made and that this fact re-
quired cleaning the same away.

Same: USE OF DANGEROUS MACHINERY: GUARDS: EVIDENCE. It is
2 competent to show by citing particular instances that there are
guards in use for the protection of workmen about a machine, re-
quired by the factory act to be provided with guards, which will
not materially interfere with its efficiency.

Same: USE OF PROPER GUARDS: STATUTES. The factory act does not
3 require an employer to use the latest and most improved ma-
chinery, or any particular kind, provided he uses such care in the
selection of the same as a reasonably prudent man would exercise;
but the act does require him to use the most efficient and best
known guards for protecting workmen from the dangers incident
to the operation of the machinery, and he must know what con-
stitute proper guards, install and keep the same in repair, although
he is not required to buy every kind of guard that may be on the
market.

Same: UNGUARDED MACHINERY: BURDEN OF PROOF: INSTRUCTION.
4 Where an injury occurs from the use of a machine unguarded as

required by the statute, as a rule it is incumbent on the employer to show that there was no guard which was practical that would have prevented the injury; but where the servant assumed the burden of showing that the machine was not guarded as required by the statute and offered evidence in support thereof, an instruction practically withdrawing the evidence and advising the jury that defendant was not bound to install the latest and most improved guards or appliances, and that his duty was performed if he furnished such guards and appliances as were reasonably safe and proper, was, under the circumstances prejudicial error.

Same: INSTRUCTION. In an action for a personal injury resulting from
5 the unguarded condition of a machine required by the statute to be provided with proper guards for the protection of workmen, the court should advise the jury what sort of a contrivance would in law be considered a proper guard, or at least define the requirements of the statute so that the jury would be able to say whether the machine was properly guarded. The instruction in the instant case was insufficient in this respect.

Same: NEGLIGENCE OF VICE PRINCIPAL. Where an experienced man in
6 charge of the planing machine by which plaintiff was injured while removing shavings, operated the machine and removed the shavings in the presence of plaintiff without using the guards provided, and there was evidence that he never used the guard because he deemed it a nuisance, he stood as the representative of the master whose duty it was under the statute to provide a suitable guard, and the master could not say that the negligent act of his representative was that of a co-employee.

Same: ASSUMPTION OF RISK: INSTRUCTION. Where the plaintiff al-
7 leged that the machine by which he was injured was dangerous within the meaning of the factory act, the court should have instructed substantially in the language of the statute that plaintiff should not be deemed to have assumed the risk of defects in the machine, known to both himself and the master, by continuing in the work, unless in the ordinary course of his employment it was his duty to remedy the defects.

Same: NEGLIGENCE: WARNING. Where an employee is given more
8 hazardous work than that for which he was employed and accustomed to, it becomes the duty of the master to warn him of the dangers incident to the new employment, failure to do which is negligence.

Same: RELATION OF MASTER AND SERVANT: SCOPE OF EMPLOYMENT.
9 Where plaintiff was set to work about a planing machine with an

experienced fellow servant in charge, and with mere general directions as to what to do, and as occasion required the employee in charge removed the shavings in plaintiff's presence without using the guard, plaintiff's attempt to remove them in the same manner was an act within the scope of his employment.

Same: CONTRIBUTORY NEGLIGENCE. An inexperienced employee set to work with a machine in company with a fellow servant in charge of the same, and having no knowledge of his danger and without warning, is justified in believing it to be safe; and his conduct in following the example of the more experienced servant in operating the machine will not render him guilty of negligence as a matter of law.

Same: CONTRIBUTORY NEGLIGENCE: STATUTE. Under the provisions of the factory act the doctrine of assumption of risk is not a defense, unless it amounts to contributory negligence; and a stronger showing is required to establish contributory negligence under the statute than at common law.

Appeal from Floyd District Court.—HON. C. H. KELLEY, Judge.

TUESDAY, MARCH 24, 1914.

ACTION to recover damages for injuries received by plaintiff's intestate while working about a planer or straightener in defendant's shops. Trial to a jury, verdict and judgment for defendant, and plaintiff appeals.—*Reversed.*

J. H. Lloyd and Frank Lingenfelder, for appellant.

H. J. Fitzgerald, for appellee.

DEEMER, J.—This action was brought by Charles R. Murray, during his lifetime, to recover damages for injuries sustained by him while in defendant's employ, working with or about a machine variously styled a "buzz planer," a "jointing," and a "straightening machine." After the trial in the lower court, plaintiff died, and his administratrix was substituted. It is not claimed that death resulted from the

injury, and on that account it will be more convenient to treat the case as if Charles R. Murray were plaintiff, and we shall use that term during the course of the opinion, meaning thereby Charles R. Murray, the injured party.

Until a few years before his death, plaintiff had been a farmer; but after leaving the farm he became a common laborer, and just prior to the time of receiving his injuries had been shoveling coal and unloading cars for various parties, before entering defendant's employ. He was employed by defendant to work in his factory three days before his accident, receiving \$1.50 per day as wages. During the first of these three days, plaintiff was at work cutting harrow teeth and driving them into bars, working about a boring machine for boring holes in bars for harrow teeth, and assisting in planing harrow bars. On the afternoon of the third day and the morning of the fourth, he was directed by defendant to assist one Lusk with the straightening and jointing of some wagon tongues upon the jointer, or straightener, or planer in question. The men had nearly finished running something like two hundred tongues over the machine, when plaintiff received his injuries. Plaintiff had never worked with such a machine, although it seems that he had worked about a machine shop, where such machines were in use, for ten or eleven months before he entered defendant's employ. For the purposes of this case we must say, under the record, that plaintiff was entirely unfamiliar with such machines as the one in question, did not know of any special danger incident to their use, and was unfamiliar with the hazard in working therewith. Defendant showed the two men, plaintiff and Lusk, how to run the tongues over the machine and across the knife blades, and as to how to use what is called a guard while running the timbers through the machine. Plaintiff was not warned of any danger or given any special instructions regarding the use of the planer. Lusk had had some experience with such machines and knew how to manage them.

It seems that the timbers with which the employees were

working were wet, and to some extent covered with ice or snow, and that shavings and this ice and snow gathered upon the table of the machine, and that these shavings, etc., had to be brushed off in order that the work might be properly done. Lusk had done this work of brushing off with his hands several times while they were engaged in the work, but at the particular time in question, plaintiff being nearest the knives, he undertook to brush off the shavings and ice. He had on

what are called glove mittens, and, taking a stick eight or ten inches long, he undertook to get rid of the shavings, etc., as Lusk had done, and in so doing caught his hand in the planer knives, which were running at great velocity, and lost the thumb and forefinger and the use of the middle finger of his right hand.

The only method of reproducing the machine is to attach a photograph, which we have taken from the record, and here insert. This photo was taken at an angle of about 45 degrees, and it shows what is claimed to be a guard upon the machine,

and the blades or knives of the planer were covered with white chalk in order that the camera might show them more distinctly.

In addition to charging defendant with negligence in failing to warn and instruct plaintiff regarding the use of the machine, plaintiff also pleaded that:

The said planing machine was not properly guarded, as by law required, or in any manner guarded. That the said machine, as maintained and operated by the defendant, was a dangerous machine. That the defendant was negligent in maintaining and operating said planer in the condition in which it was in, and in permitting the plaintiff to operate said planer while in a dangerous condition and improperly guarded. That said machine, as operated and maintained by the defendant, was faulty and dangerous for there were no feed rollers attached to said machine, no blower, no hood guard, and no cover to said machine.

Defendant admitted that plaintiff received the injuries complained of, denied that the machine was a dangerous or unguarded one, denied that plaintiff was injured while performing his duties, pleaded contributory negligence, and further denied: "That said machine, as operated and maintained by him, was faulty and dangerous for the reason that there were no feed rollers, blower, hood guard, nor cover attached to said jointing or straightening machine, and for further answer states that such appliances are not used in connection with the operation of said machine."

On these issues the case was tried, resulting in a verdict and judgment for defendant, and plaintiff appeals.

It will be observed that plaintiff's pleading is broad enough to cover injuries as at common law without reference to any statute, and that it also states enough facts to bring the case under the factory act (Code Suppl. section 4999-a2), and Acts 33d General Assembly, chapter 219. These latter enactments read as follows:

amply protect the operators thereof. He introduced into the record cuts of some of these devices, which we here set out:

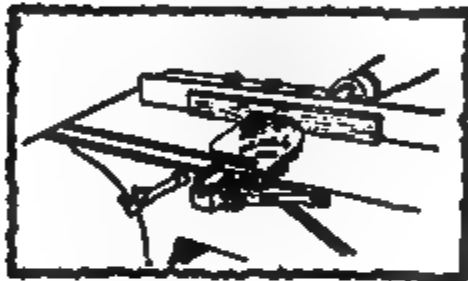
Exhibit "A"



Jones Guards

Exhibit "C"

Exhibit "B"



Badger Jointer Guard

**Champion Automatic
Flexible Safety Guard**

Much, if not all, of the testimony offered by plaintiff with reference to the use of guards, hoods, blowers, etc., upon such machines, was finally stricken from the record on the theory that such evidence related to "buzz planers," and was not applicable to "jointers and straighteners," and was therefore incompetent. Counsel for appellee now insist upon this theory and say that appellant is raising a false issue when he attempts to prove that there are adequate and sufficient guards for "buzz planers." The trouble with this contention is two-fold. In the first place, plaintiff's witnesses used the terms "buzz planers," "straighteners," and "jointers" indiscriminately, and in their testimony specifically referred to guards for such a machine as the one upon which plaintiff was injured. In its main features the case turns upon this proposition, and, as appellee's counsel seem to be mistaken as to the record, their argument in support of the rulings of the trial court fails of its purpose.

In this connection it should also be stated that the machine was so placed in the building that the wagon tongues which were being straightened and joined could not be made

1. MASTER AND
SERVANT: per-
sonal injury:
evidence.
- to go into the machine squarely until they had gone so far over the planer that the other end could be gotten past a partition or wall.

This feature of the case is only important, however, on the theory that in going over the planer at an angle more shavings were made than if it had gone squarely over it, and that this brought about the necessity for cleaning the bed of the table. There is little direct testimony to support this conclusion, but we think that the testimony should have been received, and allowed to stay in the record.

Some of the plaintiff's expert woodworkers were permitted to testify as to hoods, guards, rollers, blowers, etc., used on like machines at other places in the country, especially

2. SAME: use of
dangerous ma-
chinery:
guards: evi-
dence.
- at a factory in Minnesota, and that these had a tendency to protect the workmen, because they assisted in removing the shavings, dust, dirt, etc., and that some of them were an

adequate protection to the workmen because they automatically covered the planer when no timber or other material was passing through the machine. Some of these guards are shown in the cuts hitherto set out. Most of this testimony was finally stricken from the record on defendant's motion, and this we think was error.

In order to prove that a machine was unguarded, under our factory act, it was competent for plaintiff to show, by men with proper qualifications, that there were and are guards in use which will protect men working about the machine, and not substantially interfere with the efficiency of the machine, and this they may do by citing particular instances.

Our factory act requires all such machines to be properly guarded, and the intent of that law is to require the use of

the most efficient and best known guards for the purpose.

3. **SAME: use of proper guards: statutes.** True, the employer is not required to try every guard which may be put upon the market, but he is, as we think, bound to the

exercise of care and diligence in the discovery and equipment of his machines with suitable and efficient guards. The safety appliance act casts upon him a greater duty than was imposed at common law. As to the machine itself, he may not be bound to select or adopt the latest and best appliance, no matter what its cost, or his ability to pay for it; nor is he bound to use any particular kind of machinery in his work. He is required to use such care in the selection of his appliances as a reasonably prudent man would exercise, and is not bound to select the best, unless those which he supplies have some radical fault or are so generally obsolete and supplanted by others that the adoption or retention of the inferior appliance in itself indicates negligence. This rule of law is applicable to the claim that the knives used on the planer were not set, as they should have been, into the head of the shaft. It perhaps would have been better to have submitted this issue to the jury, especially in view of the offer of plaintiff to amend his petition to cover the exact point. By reason of the court's ruling, plaintiff was not permitted to develop this point, and we speak, therefore, with no assurance upon the question as to whether the faulty construction of the machine itself should have been submitted to the jury.

As to guards, however, a somewhat different rule obtains in virtue of the statute quoted. The machine, no matter what its kind, must be properly guarded, and the employer must know what are proper and efficient guards, and, having ascertained, he must install them, and keep them in repair.

4. **SAME: un-guarded machinery: burden of proof: instruction.** When a machine of the kind described in the statute is found unguarded, and an injury happens, it is, as a rule, incumbent on the employer to show that there was no guard, which was practical, that would have prevented the injury. *Kimmerle v.*

Dubuque Co., 154 Iowa, 42, and cases cited; *McCarney v. Bettendorf Axle Co.*, 156 Iowa, 418.

In the present case plaintiff assumed the burden of showing that there was a guard which could have been so attached, but the court practically took this showing away from the jury and instructed as follows: "Evidence has been introduced upon the trial in reference to different kinds of guards which are said to be used upon similar machines. This evidence should be considered by you, if at all, only in so far as same may aid you, if at all, in determining whether or not the guard which was in fact upon the machine in question was reasonably suitable to properly guard same. Defendant was not bound to furnish the best and latest improved guards nor appliances. If he furnished such a guard and appliance as was reasonably safe and proper for the purpose, in view of all of the conditions and circumstances disclosed by the evidence, then he performed his full duty in that regard."

This instruction, and the rulings on the testimony, were, we think, erroneous and prejudicial to the plaintiff. *Kimmerle v. Altar Mfg. Co.*, 154 Iowa, 42; *Miller v. Sash & Door Co.*, 153 Iowa, 735; *McCarney v. Axle Co.*, 156 Iowa, 418; *Murray v. Railroad Co.*, 152 Iowa, 732; *O'Connell v. Smith*, 141 Iowa, 1; *Kirchoff v. Creamery Co.*, 148 Iowa, 508; *Verlin v. Gypsum Co.*, 154 Iowa, 723; *Sutton v. Bakery Co.*, 135 Iowa, 390, relied upon by appellee, has been very much modified, if not overruled, in subsequent decisions.

II. There is much doubt in our minds regarding the so-called guard which was on the machine; whether it was any guard at all to the operator. At any rate, the trial court gave the following, which was its only instruction with reference thereto:

5. SAME: Instructions.

The law of this state provides that in manufacturing establishments, where machinery is used, all saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description shall be properly guarded. This law is intended as a protection, not only against the carelessness or ignorance of those who may incidentally come in contact

with dangerous machinery while moving about in its vicinity, but it is also intended as a protection to the operators themselves, who, by reason of inadvertence or some misfortune, might otherwise be injured by it. The statute does not prescribe any particular kind of guard, and it is for you to say, from the evidence which has been introduced upon the trial, whether or not the guard which was upon the machine in question at the time plaintiff was injured was reasonably proper and suitable as a guard. A planer or other instrumentality is properly guarded when the device attached is of material and construction such as will reasonably shield those operating it or moving near it from contact therewith when in motion, at least when practicable, without unreasonably interfering with the efficiency of the machine.

This instruction was, as we think, inadequate, if not erroneous, when read in connection with No. 9, immediately following which we have already quoted. There is nothing in the instruction which properly indicates what sort of contrivance would in law be considered a proper guard, and the least that may be said is that the trial court would have defined the requirement of the statute so that the jury could have been able to say whether the machine was properly guarded. *Miller v. Door Co.* and *Kirchoff v. Supply Co.*, *supra*.

It will be noticed that the guard did not act automatically, and that it was necessary for the operator to close it over the knives of the planer before it would be any protection. When so closed, it is apparent that the operator could not have brushed the shavings, ice, and debris from the table, certainly he could not have removed them from around the planer, without removing the guard.

III. In the same connection it should be observed that the record shows that Lusk was the experienced man connected with the machine; that he was in charge thereof; that

6. SAME: negligence of vice principal.

he operated it and removed the shavings and debris, in the presence of the plaintiff, without using the guard; and there was testimony that he (Lusk) never used it because he deemed it a nuisance.

It was not, therefore, in so far as plaintiff was concerned, any guard at all, for it did not work automatically, and was not worked at all while he was about the machine. As to the use of the guard, Lusk was the *alter ego* of defendant, and defendant cannot be heard to say that his negligence was that of a co-employee. This because of the statutory duty cast upon him.

IV. Plaintiff asked the court to instruct that the doctrine of assumption of risk did not apply, but this was refused. We think it should have been given substantially in the terms of the statute before quoted. *Davidson v.*

7. SAME: assumption of risk: instruction. *Iron Works*, 107 Minn. 17 (119 N. W. 484, 28 L. R. A. (N. S.) 332, 131 Am. St. Rep. 433); *Lamb v. Mfg. Co.*, 155 Iowa, 400; *Poli v. Coal Co.*, 149 Iowa, 104; *Kimmerle v. Mfg. Co.*, 154 Iowa, 42; *Verlin v. Gypsum Co.*, 154 Iowa, 723; *Murray v. Railroad*, 152 Iowa, 732; *Stephenson v. Brick Co.*, 151 Iowa, 371.

V. Aside from all this, even assuming that the machine as constructed was sufficiently guarded, the defendant may have been liable for failure to warn plaintiff of the dangers incident to its use. Defendant knew that plaintiff was unfamiliar with that kind of work, and his original employment was not for that purpose. When he was given the more hazardous work, it was the duty of his employer to warn him of the risks and dangers incident to his new employment. This was not done, and the trial court neglected to charge on this theory of the case, although it was squarely in issue. This alone demands a reversal of the case.

VI. It is not true, as defendant contends, that plaintiff was a volunteer or interloper. He was set to work about the machine with mere general directions as to what to do. His companion found it necessary at times to remove the shavings, dirt, etc., from the table of the machine, and he did it without using the so-called guard. At the time of the accident, plaintiff

9. SAME: relation of master and servant: scope of employment.

was nearest the shavings and dirt, and he attempted to remove it, using the stick, as already stated. He had not been told not to do it, and in what he did was acting within the scope of his employment.

VII. There is no room for saying that plaintiff was guilty of contributory negligence as a matter of law. He knew nothing of the machine or his danger and was justified in believing it was safe, and his conduct should also be viewed with reference to what his more experienced associate did under the same conditions and circumstances. In following this example, he should not be held negligent as a matter of law; whether, in view of all of the circumstances of the case, he was negligent was a question for the jury.

10. SAME: contributory negligence.

VIII. Of course, in so far as the case might depend upon defendant's common-law liability, the doctrine of assumption of risk and contributory negligence is in the case; but, upon the question of statutory liability, assumption of risk is no defense, save as it amounts to contributory negligence, and it takes a much stronger showing to make out contributory negligence in the latter case than in the former.

11. SAME: contributory negligence: statute.

IX. We have not undertaken to cover each and all of the forty-five points relied upon for reversal. To have done so would have unduly extended this opinion. What we have said sufficiently covers the main propositions involved, and will be an adequate guide for the court upon a retrial. Defendant's motion to strike and dismiss the appeal is overruled.

For the errors pointed out, the judgment must be, and it is—*Reversed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

ELLA DODGE, ADMINISTRATRIX OF THE ESTATE OF J. W. DODGE,
DECEASED, Appellant, v. CHICAGO, GREAT WESTERN RAIL-
ROAD COMPANY, Appellee.

**Railroads: LIABILITY FOR EMPLOYEE'S DEATH: FEDERAL SAFETY APPLI-
1 ANCE ACT: APPLICATION.** Plaintiff's decedent, a freight conductor, picked up a car enroute which was in bad order, attaching it to the rear of his train. He also fastened to the car a chain which had been used for attaching it to another car, as a convenient method of carrying the same with his train. Upon reaching the end of his run decedent left his train, registered and for the purpose of riding to his home boarded the engine of another train going out on the same track over which his train had come in. The engine on which he was riding was derailed by a portion of the chain which had been attached to the car brought in by him, resulting in his injury and death. *Held*, that as decedent had finished his run and was not then engaged in interstate commerce, and as the bad order car did not contribute to the accident the Federal Safety Appliance Act had no application, and that defendant was not liable thereunder for his death.

**Same: MASTER AND SERVANT: EXISTENCE OF RELATION: LIABILITY OF
2 MASTER.** To create a liability by an employer for injury to a servant, the relation of master and servant must have existed at the time of the injury and the injury must have been received in connection with some service being rendered while in the performance of duty, and as the result of a failure of some duty on the part of the master, or of those for whose acts he was responsible.

Where plaintiff's decedent had brought his train to the end of his run, and he had registered and was on his way home, riding the engine of another train for his own personal convenience, the relation of master and servant did not exist and the master was not liable for his injury in such circumstances.

Same: CARRIER AND PASSENGER: RELATION: EVIDENCE. One may be
3 a passenger though riding upon a freight train, if the train is used for that purpose; but the relation of carrier and passenger as between a railway company and an employee rests upon contract, either inherent in the contract of employment or by an independent agreement for his transportation. The mere existence of a custom of employees to ride from the yards of the company

to their homes at the close of work will not alone establish the relation.

Same: INJURY TO LICENSEE: REQUIRED CARE. Where an employee of
4 a railway company has permission as a licensee to ride upon a train when not engaged in his employment, he exercises the privilege at his own risk of injury from obvious dangers, and the company owes him no duty except the exercise of ordinary care to prevent injuring him upon discovering his peril.

Appeal from Polk District Court.—HON. C. A. DUDLEY, Judge.

TUESDAY, MARCH 24, 1914.

ACTION for damages resulting in death, based upon alleged negligence of the defendant. From a directed verdict for defendant, the plaintiff appeals.—*Affirmed.*

Parsons & Mills, for appellant.

Carr, Carr & Evans, for appellee.

WITHROW, J.—I. On the 22d of November, 1911, plaintiff's decedent met his death by accident, he at the time being a conductor in the employ of the defendant company. On that day he had been in charge of train No. 83, being a freight train of eighteen or twenty cars which had been made up at Marshalltown. While on the way from that city to Des Moines, two cars were taken up at Berwick, one of them being in bad order, and which was being taken to South Des Moines for the purpose of being repaired. As described by one witness, who was at the time a brakeman on train No. 83, the drawbar was out of the east end of the bad order car, and they placed it behind the caboose to take it into Des Moines. When picked up it was fastened to another car by a chain, and, after putting the two cars into the train they fastened the chain up. One end was hooked over the other part and was wired to it, and that fastened the link up with

the brake rod. The train thus proceeded towards Des Moines, and, when reaching the South Des Moines yard office, decedent left it and went into the office to register his arrival.

It was conceded that at the time train No. 83 was partially composed of cars which had been brought from a point outside the state, and destined to points in Iowa or beyond.

Train No. 62 of the defendant was made up and ready to start on its trip, and awaited the arrival of train No. 83, the one brought in by the deceased. No. 62 was intended to pass over the track on which No. 83 was to come into Des Moines. It was made up of from twenty-five to thirty cars, and had two engines. Upon the arrival of No. 83, some parties, among them Mr. Dodge, the deceased, got on the head engine to ride up to the yards. The train No. 62 proceeded about two blocks to the east, and then left the track and partly overturned. As it left the rails the engine proper turned to the right, thereby lessening the space between the right side and the tender, and the decedent, who was standing at that place, was crushed and killed. Investigation being made as to the probable cause of the accident, a piece of chain was found under the tank of the second engine, and it is the claim of the plaintiff that the derailment was caused by it, and that it was a piece of the chain which had been on the bad order car, and such the evidence tends to show.

The chain which was on the rear or east end of the bad order car on No. 83 was about twelve feet in length. It was not used as a means of coupling for bringing the car into Des Moines, but, as testified by the brakeman, he, with Mr. Dodge, the decedent, fastened it up and wired it as a convenient means of carrying it. After the accident, upon examination, about three feet of the chain was yet attached to the car. The chain found under the tender of the second engine on No. 62 was of the same kind. The brakeman testified that the chain was still on the rear of the car when he closed the switch at Ready, a point in East Des Moines. He also testified that the employees of the Great Western ride the trains out from South

Des Moines to their various homes, and that he had heard no protests or objections to such being done on freight trains, and that he had known of such being done for sixteen years.

It was conceded that train No. 62 had cars destined for points beyond Iowa, and that the defendant was operating its line of railway from Chicago, Ill., through and across Iowa to points in Missouri and Minnesota.

II. Plaintiff's cause of action was presented in three counts. The first charges liability under the federal Employers' Liability Act (Act April 22, 1908, chapter 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, page 1322]), which has for its object the protection of employees engaged in interstate commerce. The second count charges negligence in moving the bad order car from Berwick to Des Moines, contrary to the provisions of the Safety Appliance Act (Act March 2, 1893, chapter 196, 27 Stat. 531 [U. S. Comp. St. 1901, page 3174]); and the third count rests upon the claim that decedent was at the time a passenger on train No. 62.

Under the first count, negligence is charged in the fact that the servants of the defendant failed to use reasonable effort to protect the deceased after they knew that he was placed in a position of peril by reason of the derailing of the engine, and prior to the time it left the track so as to overturn; that the engineer negligently ran his engine sixty or seventy feet after it had left the rails; that the engineer of the second engine negligently pushed the derailed engine after it was so derailed.

The claim of liability under the second count is based upon the charge that the engine was overturned by reason of the negligence and unlawful act of the defendant in moving from Berwick to Des Moines a car not at the time properly equipped with automatic safety device. The answer was a general denial, with the particular averment that the accident which caused the death of the decedent was in no manner connected with the movement or handling of the defective car from Berwick to Des Moines, and the defective coupling

was not in use at any time in the movement of the car between those stations. The negligence of the decedent is also pleaded. There was a trial to a jury, and, upon the conclusion of the evidence, a verdict was directed for the defendant, and the plaintiff appeals. We will consider the questions raised by the appeal in the order of their presentation.

III. It is first urged that, under the federal Safety Appliance Act, the movement of the bad order car between the two stations was at the risk of the de-

1. RAILROADS :
liability for em- fendant, and that it is under said act liable
ployee's death :
federal Safety for such accidents as arise therefrom or are
Appliance Act :
application. connected therewith. The provisions of the

act, as bearing upon the claim presented by appellant, are as follows:

And such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure, or which is not maintained in accordance with the requirements of this act, and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains, instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable freight.'

Under the facts appearing in this record, and which are not in dispute, we are not able to make that application of the statute upon which appellant insists. The decedent was not, at the time of the accident which resulted in his death, engaged in interstate commerce. His service in that connection had ended upon his arrival at the station, when he left his train and registered; and the subsequent act of his in boarding the head engine of another train, with the operation of which he was in no way connected, was entirely without relation to his previous service.

In *Pederson v. D., L. & W. R. Co.*, 197 Fed. 537 (117 C. C. A. 33), it was held that the act applies only to injuries suffered by employees while the carrier is engaged in interstate transportation, and to such employees only as have a real and substantial connection with such act. Based upon the same idea is the holding in *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1 (32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44). It should be observed in this connection that, while the bad order car had a defective coupling, such defect in no way entered into the situation, other than because of it the car was brought in for repairs. No use was made of the defective coupling as a means of attaching it to the train. It was on the rear end of the car, which was at the end of the train. The chain, which it may be assumed for the purpose of this hearing caused the derailment of the locomotive, served no purpose in bringing the car from Berwick to Des Moines, but was merely fastened at its rear as a convenient means of caring for it. The chain itself was not a defective appliance, but was a means only, when in use, to cover emergencies arising from defects in other parts.

The accident did not result from any causal connection with the defective condition of the car, but from a cause which was unrelated to it, excepting that the chain had previously been used to couple that car to another one, but which at the time of the movement of the car was not so used. Under these facts, which are not in dispute, we think the provisions of the Safety Appliance Act are without application.

IV. That act not governing in the present case, it follows that the charge of negligence based upon it cannot be sustained; and this, with the conclusion stated as to the facts, renders unnecessary a consideration of the averments of negligence, under the federal Employers' Liability Act, further than the statement that it appears without dispute in the record that the chain was attached to the rear of the car by the brakeman and the conductor, the decedent, and under the

direction of the latter; and, if it was insecurely fastened, such was from the act of no one but himself.

V. It is claimed that the decedent, when he was upon the locomotive of train No. 62, was either an employee or a passenger, and in either view was entitled to the protection

due to such. He was not an employee, for the service in which he had been engaged had ended, and he had gone upon the locomotive to ride towards his home, or for some purpose entirely without connection with the operation of train No. 62 or with any other service by him to the company.

2. SAME: master and servant: existence of relation: liability of master.

To create liability by an employer for injuries to an employee, the relation of master and servant must have existed at the time of the injury, and it must have been received in connection with some service being rendered by him, and while in the line of his duty, and from some failure of duty on the part of the master, or those for whose negligent acts he would be liable. *Dickinson v. West End Street R. Co.*, 177 Mass. 365 (59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284).

VI. Was the decedent at the time a passenger on train No. 62? That was not a passenger train, but such would not

be controlling if it had in fact been permitted to be used for passenger service. But such service is based upon a relation between the carrier and the person claiming to be a passenger. *Fitzgibbon v. C. & N. W. R.*, 108 Iowa, 618.

It appears in the evidence, from the testimony of the brakeman, that he had known of the custom of employees boarding the engines of outgoing trains to ride to their homes, after their own service had ended; but, in the absence of further proof showing that such was because of and a part of the contract of employment between the company and its employees, it would not show the relation of carrier and passenger.

3. SAME: carrier and passenger: relation: evidence.

As holding that such relation rests upon a contract, either inherent in the contract of employment or an independent agreement for transportation for him, see also, *Doyle v. Fitchberg R. R. Co.*, 162 Mass. 66 (37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335); *McNulty v. Railroad Co.*, 182 Pa. 479 (38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721).

VII. We conclude that the decedent, at the time of the accident which resulted in his death, was neither an employee nor a passenger, as such terms are used in fixing liability.

Assuming that he, with others, had by permission enjoyed the privilege of riding upon the engine towards his home, after his own service had ended, he was but a licensee. Being such, and giving to the evidence all the weight and force that can be properly claimed for it, the standard of duty towards him for his protection would be that the defendant, thus permitting the decedent to ride, would be held only to the exercise of ordinary care, and that the licensee exercises the privilege at his own risk of obvious or patent dangers (29 Cyc. 450), and under such conditions the defendant owed him no active duty excepting upon the discovery of his danger. *Richards v. C., St. P. & K. C. Ry. Co.*, 81 Iowa, 426; *Rutherford v. Railway Co.*, 142 Iowa, 744.

VIII. The charge that the engineer was negligent in failing to use proper efforts to stop his engine after it left the rails is without support in the evidence; and there is no dispute as to the fact testified to by him that, upon discovering the derailment, he immediately applied the emergency brakes in endeavoring to stop the movement of his engine; nor is there any proof tending to show negligence on the part of the second engineer in, as charged, pushing the head engine forward after knowing that it had left the track. From the whole record, we find no facts establishing any negligence on the part of those in charge of or operating train No. 62, as charged, much less in any manner creating

4. SAME: Injury to licensee: required care.

liability to the estate of decedent, arising out of its duty to him as a licensee.

The ruling of the trial court in directing a verdict was correct, and the judgment entered by it is—*Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

CHARLES ARBAUGH, Appellant, v. F. M. ALEXANDER and KATIE ALEXANDER.

Easements: TERMINATION BY TRANSFER OF SERVIENT ESTATE: FRAUD:

1 EVIDENCE. Where the owner of premises granted a right of way over the same to an adjoining owner for such time as he should remain the owner, a conveyance to his wife of the bare legal title for the sole purpose of depriving the adjoining owner of the right of way would not terminate the easement; but in the instant case the evidence disclosed that the conveyance was made for a sufficient consideration and prior to any controversy or threatened litigation and no fraudulent purpose was shown, except that the conveyance was in the nature of a gift and made shortly before commencement of suit to restrain obstruction of the way. *Held*, insufficient to support the action.

Same: RIGHT TO TERMINATE: FRAUDULENT CONVEYANCES. One having

2 granted a right of way over his land for such length of time as he shall continue to own the same does not thereby lose the right to sell or give the land away, even for the purpose of terminating the easement; as neither a creditor nor the holder of a lien upon the land could object that a conveyance by the owner was voluntary.

Appeal from Harrison District Court.—HON. THOMAS ARTHUR, Judge.

TUESDAY, APRIL 7, 1914.

ACTION in equity to enjoin the obstruction of a private way and for the recovery of damages. Petition dismissed, and plaintiff appeals.—*Affirmed*.

Cochran & Barrett, for appellant.

H. H. Roadifer and *C. A. Bolter*, for appellees.

WEAVER, J.—The right of way in controversy was considered in this court in *Arbaugh v. Alexander*, 151 Iowa, 552. It is the claim of plaintiff that in 1903, he being then owner of a farm in Harrison county, and the defendant F. M. Alexander being the owner of a forty-acre tract cornering thereon, they entered into an agreement whereby a way was opened from plaintiff's land across a portion of defendant's land to the public highway, the same to be for the use and benefit of both parties and of others who might choose to make use of the same, and that, in consideration of plaintiff's undertaking to build a bridge thereon and to keep the same and the way in repair, plaintiff's right to use the same should continue so long as said Alexander should live or so long as he remained the owner of the land. The evidence tends to show performance of his promise by the plaintiff, and that the way was used in common by him and Alexander for several years. On April 14, 1910, the said F. M. Alexander by warranty deed conveyed the land to his wife, Katie Alexander; but the deed was withheld from record. In June, 1910, plaintiff brought action in the district court against the defendant F. M. Alexander, charging him with wrongfully obstructing said way, and praying an injunction against such interference with plaintiff's use thereof. A demurrer to that petition, on the ground that the alleged agreement was within the statute of frauds, and without consideration, was sustained. On appeal to this court, the judgment below was reversed and cause remanded for further proceedings. Thereafter the cause came on for trial in the district court, where the issues were decided in plaintiff's favor on November 7, 1911. A few days prior to said trial and judgment, the deed to Katie Alexander was placed on record. Shortly thereafter, and after the final judgment in the former case, the defendants, or one of them, again closed the way against use thereof by the plaintiff, and this action was begun making both husband and wife defendants. The petition restates the agreement by which the right was obtained and alleges that the conveyance

of the land from F. M. Alexander to his wife was made in fraud of plaintiff's rights in the premises, and for the express purpose of affording a ground upon which to terminate plaintiff's use of said way. The defendants both admit the conveyance. The wife also admits that she has obstructed the way, closing the same against the plaintiff's use, and avers that in her hands the land is not incumbered by the easement or right of way claimed by the plaintiff. The court held with the defendants in this contention, and plaintiff again appeals.

In their argument to this court counsel for appellant plant their demand for reversal of the judgment below upon the single proposition that F. M. Alexander is still the real

owner of the land and the conveyance to Alex-

1. EASEMENTS :
termination by transfer of
servient estate :
fraud : evidence.

ander's wife was a mere pretense to work an

apparent change of ownership in order to

eliminate plaintiff's right of way while the

real beneficial ownership remains in the husband. In other words, it is claimed that the wife holds only the naked legal title in trust for her husband. If this be not the fact, and the wife is vested with what counsel calls "the real ownership" of the land, then they concede that the case is one for affirmance. We think it a sound proposition that if the conveyance was intended solely to give the wife a color or appearance of ownership for the purpose of putting an end to plaintiff's right of way in the lifetime of said F. M. Alexander, and his wife received and holds the legal title for his use and benefit, such change of title is not a contingency contemplated by the original agreement between Alexander and plaintiff; and, if that fact were established by the record, then unquestionably the ruling of the trial court was wrong.

But unfortunately for the appellant, there is no evidence in the record laid before us to sustain such a finding. The deed of conveyance bears date two months before the inception of the litigation between the parties to these lawsuits, and no attempt is made to show that the date of the instrument is not the true date of the transaction. Nor is there

any showing that at said date there was any controversy or threatened litigation between plaintiff and F. M. Alexander.

While the consideration named in the deed is "love and affection" and the payment of a merely nominal sum of money, it is legally sufficient to sustain the conveyance, and, so far as anything is disclosed by the instrument itself, its delivery to the grantee had the effect to vest her with absolute title and ownership, and thereafter the husband's only interest in the land was his statutory contingent right to a distributive share therein, should he survive his wife.

Fraud will not be presumed. There is nothing shown nor do counsel point to any fact tending, as they claim, to show a fraudulent purpose on part of defendant's except the fact that the deed was in the nature of a gift conveyance to the wife and was shortly before the beginning of the original suit.

But while, as we have said, defendants could not eliminate plaintiff's right of way by a conveyance of the mere naked legal title for the husband's benefit, it is equally true that

2. SAME: right to terminate: fraudulent conveyances. the agreement by which plaintiff's right of way was to continue during said Alexander's life, or so long as he remained the owner of the land, did not divest Alexander of his right to sell the land or to give it away whenever he saw fit to do so, and any conveyance to effectuate such sale or gift would work a revocation of plaintiff's license to use the right of way. When we say sale or gift, we mean, of course, a transaction by which the grantor or donor intends to part and does part with both legal and equitable titles to his property. So long as the sale or gift was actual, not merely colorable, the fact, if it be a fact, that defendant sold or gave the property to another for the express purpose of terminating plaintiff's right of way over it, would not be a fraud nor afford plaintiff any ground of relief; for his right to such way, by the very terms of the agreement, was to end with the defendant's ownership. It follows that when the duration of such ownership ceases, no

matter how brought about, a right of way which was dependent thereon must cease with it. There is nothing therefore in the mere fact that the wife gave no valuable consideration for the deed, or that such deed was made shortly before this litigation was begun, to justify the court in saying that she is a mere trustee, holding the title for the use of her husband.

Plaintiff is not a creditor who can object to a voluntary conveyance by the defendant. He had no lien on the property. Whatever rights he had in the premises alluded to were dependent upon the ownership of F. M. Alexander, who retained the absolute right to part with such ownership in any legal manner whenever he might desire so to do. It follows that, upon the sole question presented by the appeal, the judgment below must be affirmed. Plaintiff makes no claim on the theory that the judgment or decree in the former case was an adjudication binding upon the defendant Katie Alexander, who held the title to the land by an unrecorded deed when the original suit was begun and prosecuted to judgment against her husband as the apparent owner of record in possession, and we are not called upon to consider or decide that question.

For the reasons stated, the judgment appealed from is—
Affirmed.

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

HANS HANSON, Appellee, v. WESTERN UNION TELEGRAPH
COMPANY, Appellant.

Evidence: MARKET VALUE: COMPETENCY OF WITNESS. A farmer who
1 has occasion to purchase and sell cattle to some extent, and who accompanied a cattle buyer in a joint effort to purchase cattle at the lowest possible price, though engaged chiefly in raising grain, was competent to testify to the market value of cattle in the community in which he lived.

Same. A stock buyer who had visited the vicinity many times and
2 purchased many cattle, and at the time in question sought to purchase cattle from numerous farmers in the locality, was also competent to testify to their market value at that time and place, although he did not reside in that community.

Telegraphs and telephones: DELAY IN DELIVERY: MEASURE OF DAMAGES.

3 Plaintiff was offered cattle at a certain price if taken by a stated day, and telegraphed his son to buy them in time for the message to have been delivered before expiration of the time for purchase, but the telegram was not delivered until two days later. Immediately upon learning that the telegram was thus delayed he saw the seller who refused to sell except at an advanced price, and he then bought from others at the advanced market price. *Held*, that the measure of damage for failure to deliver the message in time was the difference between the price offered and the price he was required to pay.

Same: EVIDENCE. Evidence that when plaintiff saw the seller after
4 his offer to sell the cattle had expired he refused to perform his offer, was admissible on the question of diligence, in reducing his loss; but his testimony that the cattle would have been delivered at the agreed price if his offer had been accepted in time was inadmissible as hearsay, but was without prejudice in view of the fact that the evidence to that effect was undisputed.

Appeal from Harrison District Court.—HON. E. B. WOODRUFF, Judge.

TUESDAY, APRIL 7, 1914.

ACTION for damages for negligent delay in transmitting a telegram from Dunlap, Iowa, to Streeter, N. D., resulting in loss to the plaintiff of an offer of sale of cattle which the plaintiff desired to purchase. There was a verdict for the plaintiff and the defendant appeals.—*Affirmed*.

George H. Fearons and Saunders & Stuart, for appellant.

M. B. Bailey and J. H. Roadifer, for appellee.

EVANS, J.—The plaintiff resided at Dunlap, Iowa. His son, Peter Hanson, resided near Streeter, N. D. The plaintiff was desirous of purchasing cattle in the neighborhood of Streeter for the purpose of shipping to Dunlap, and had had

some correspondence with his son in relation thereto. About March 1, 1911, the plaintiff received from his son the following letter: "I will write you a few lines in regard to the cattle. I seen the man today, and he has got sixty head of steers that will weigh 700 pounds, and will take \$4.25 per hundred. He will ship March 3d, and, if you want the cattle at that price, wire me at once, or come up here and buy them yourself. I will close."

He immediately delivered to the defendant company the following reply telegram for transmission: "Dunlap, Iowa, March 1st, 3 P. M. Peter Hanson, Streeter, North Dakota. I will come on first train; hold the cattle until I get there if you can; if not, buy them at four and quarter or less. Hans Hanson."

The offer of sale which Peter had was from one Wentz, and was to be accepted on or before March 2d. The telegram was not delivered at Streeter until the afternoon of March 4th. Shortly after the delivery of the telegram to the defendant at Dunlap, the plaintiff took a train for Streeter and arrived there at about 9 o'clock p. m. of March 3d. On March 4th, and before the arrival of his telegram, the plaintiff and his son went to the home of Wentz, who lived seven miles distant, for the purpose of buying the cattle in question. Wentz, however, had already sold a part of the cattle on the day previous, and held the remainder at the advanced price of \$4.70, instead of \$4.25. The plaintiff and his son spent that day and one or two days following going from farm to farm in an effort to purchase an equal number of cattle. They were unable to buy any at a less price than at \$4.70 per hundred. They did buy the required number at that price. The larger number were bought from Wentz, and these were a part of the sixty head included in the first offer. The measure of damages claimed is the difference between \$4.70 and \$4.25 per hundred for sixty head of cattle of 700 pounds weight. The evidence on behalf of the plaintiff is undisputed; the defendant offering no evidence. Many assign-

ments of error are made in appellant's brief. These may be grouped into a few divisions.

I. The first group of alleged errors challenges the competency of Peter Hanson to testify to the market value of cattle on March 4th, 5th and 6th in and about Streeter, N. D.

1. EVIDENCE: market value: competency of witness. Peter was not in the cattle business. He was a farmer operating a farm of eight hundred acres, which was mostly devoted to the raising of grain for sale. Like all farmers, however, he had occasion both to purchase and to sell cattle to some extent. He accompanied his father in their joint effort to purchase cattle for the lowest possible price. If the market value of cattle in a rural community cannot be ascertained in this way by a farmer in such community, appellant ought to have aided us with a suggestion of some better way. We think the testimony of Peter on this question was clearly admissible, and that the objection to his competency was properly overruled.

The second group of errors challenges the competency of the plaintiff to testify to the market value. The plaintiff was not a resident of Streeter, but was a resident of Dunlap, Iowa. He was an experienced stock buyer.

2. SAME. He had visited Streeter and vicinity many times, and had previously bought hundreds of cattle in such vicinity. He had last been there about six months previous to his March trip. In the light of his investigation and experience on March 4th, 5th and 6th, we think it very clear that his testimony was also admissible, and that the objection to its competency was properly overruled.

II. It is urged by appellant that, inasmuch as the offer of sale by Wentz expired on March 2d, the measure of damages was controlled by the state of the market on that day, and that the amount of defendant's liability became fixed on such date. It is urged that there is no evidence to show what the market was on March 2d. Even though it were conceded that the rule contended for by appellant might be

3. TELEGRAPHS AND TELEPHONES: delay in delivery: measure of damages.

applicable in some cases, it is not applicable to the facts presented in the case at bar. Plaintiff was not intending to purchase these cattle for the purpose of a resale in the same market place. The plaintiff had no knowledge of the failure of the defendant to deliver his telegram until he arrived at Streeter at 9 o'clock p. m. March 3d. On the morning of March 4th he proceeded at once in his effort to save himself from injury consequent upon defendant's negligence. That he used all diligence in that regard is undisputed. As a matter of law, he was entitled to pursue this course, and to measure his damage thereby. His telegram instructed Peter to buy the cattle. He had a right to rely upon the prompt delivery of the message. He did not know to the contrary until the night of March 3d. His first opportunity, therefore, to recoup his damage was on March 4th. To say, upon such a state of facts, that the liability of the defendant company was fixed by the market on the night of March 2d is quite beside the mark. The appellant's counsel places special reliance on the case of *Brewster v. W. U. T. Co.*, 65 Ark. 537 (47 S. W. 560), as presenting a case almost identical in its facts. They present to us the following quotation from the opinion in that case:

Now, the contract which plaintiffs claim to have made with Langly gave them an option to accept and purchase a lot of cattle owned by him at \$12 per head, this option to expire at noon on the 14th day of May, 1895. If the telegram had been received in due time, and plaintiffs had accepted the offered purchase, they would at that time have owned the cattle, and would have paid out the contract price thereon. The telegram was delivered on the same day, but not until 7 o'clock p. m., some hours after the time allowed for the acceptance of the contract had expired, so plaintiffs lost the right to purchase the cattle, but retained the money they agreed to pay for the same. It is manifest, therefore, that the plaintiffs were not injured, unless on the 14th day of May, at the time the telegram was delivered, the market value of cattle of the grade purchased was at that place greater than the contract price, or unless, on account of the scarcity

of cattle, *or for some other reason plaintiffs could not, by the use of due diligence, after the delivery of the telegram, have purchased the like number and grade of cattle for the contract price.* . . . It is a matter of no moment that some days subsequent to the delivery of the telegram there was a rise in the market value of cattle, and that, if plaintiffs had purchased cattle at the contract price, they might have obtained profits from such rise in value, for the law does not permit the recovery of such uncertain and speculative damages.

The italics are ours. The italicized portion quite covers the case at bar, and distinguishes its facts from those of the cited case.

What we have here said disposes, also, of the objection to the ninth instruction, because it failed to specify the market of March 2d as the market to be considered by the jury.

III. The only other error argued by appellant relates to certain alleged conversation between the plaintiff and Wentz. Over ^{his} appropriate objection by the appellant, the plaintiff testified to his conversation with Wentz as follows: "Q. What did he say with reference to those thirty-five head he had left? (Objected to as hearsay, incompetent, immaterial, and irrelevant. Overruled. Exception.) A. We had a talk with him, and he said he could get us fifty or sixty head at \$4.70, but not at \$4.25. He said he wouldn't deliver those he had on hand at \$4.25. He said he did not get the message—he didn't have to keep his word, he said, because he didn't get the telegram. Q. What did he say, if anything, as to what he would have done? (Objected to as hearsay, incompetent, and immaterial. Overruled. Exception.) A. He said he would have delivered the cattle at \$4.25."

As to the first of the above answers, we think it was properly admissible on the question of due diligence exercised by plaintiff to avoid or reduce his damage.

As to the second answer, it was hearsay, and objectionable on that ground. In the light of the entire record, how-

ever, it was clearly nonprejudicial. As already indicated the evidence on behalf of plaintiff was undisputed. It would permit of no other inference than that Peter could have bought the cattle up to the night of March 2d for the offered price. Such fact was one which in its very nature could not have been established except by inference. Testimony by Wentz to that effect would have been appropriate; but it would have been only an inference even then. We think that the error at this point, in the light of the whole record, is too trivial to justify a reversal. The defendant's negligence was gross. The plaintiff's case is meritorious and definite, and practically undisputed.

The judgment below was right and is accordingly —*Affirmed.*

LADD, C. J., and WEAVER, GAYNOR, and PRESTON, JJ., concur.

A. PATTEN, Appellant, v. H. B. HASELTON, JOHN KERPER, P. W. SCHENKELBERG, FRED NEUMAYER, H. D. HINZ, Board of Canvassers and Board of Supervisors in and for Carroll County, Iowa, Appellees.

Elections: DEATH OF CANDIDATE: VACANCY. When the death of a candidate for public office occurred so recently before the election that it was practically impossible to fill the vacancy, but he received a plurality of the votes without knowledge generally of the voters that he was deceased, the plurality vote cast for him will prevent the election of another candidate for the same office having a less number of votes; for although deceased was not a person in a legal sense the next highest candidate did not receive the greatest number of votes, within the meaning of the statutes.

Appeal from Carroll District Court.—HON. M. E. HUTCHINSON, Judge.

TUESDAY, APRIL 7, 1914.

ACTION of mandamus against the members of the board of supervisors of Carroll county acting as canvassers of elec-

tion returns. The prayer of the petition is that the defendants be ordered to declare the plaintiff duly elected, at the general election of 1912, as a member of the board of supervisors of Carroll county for the term beginning January 1, 1914. Upon trial had, plaintiff's petition was dismissed, and he appeals.—*Affirmed.*

Lee & Robb and Chas. C. Helmer, for appellant.

Reynolds & Meyers and E. A. Wissler, Douglas Rogers, and Brown McCrary, for appellees.

EVANS, J.—Some controversy is presented over questions of practice. The defendants challenge the right of the plaintiff to try the question presented in an action of mandamus. In view of our conclusions on other features of the case, we shall have no occasion to pass upon this question. Also the appellant contends that the case is triable here de novo, on appeal, whereas the defendants contend that it is triable on errors only.

We find ourselves in accord with the trial court in the finding of facts. It is therefore immaterial, for the purpose of this appeal, whether it be deemed triable de novo or otherwise.

The material facts are undisputed. The plaintiff was the regular Republican candidate upon the ballot in the general election of 1912 in Carroll county for the office of county supervisor, for the term to begin January 1, 1914. One Shirck was the regular democratic candidate upon the ballot for the same office. At 8:30 o'clock of the night preceding the election day, Shirck died. The election proceeded on the following day without any change in the official ballot, and without any attempt at filling the vacancy on the part of the party officials, and without knowledge on the part of the voters generally that the death of the candidate had occurred. Upon a canvass of the election returns, by the canvassing board, it was found that more than 1,800 votes had

been cast for Shirck, and that about 1,100 were cast for the plaintiff. No other candidate received an equal number with the plaintiff. It will be noted, therefore, that the highest number of votes cast, were cast for the deceased candidate, and the next highest number were cast for the plaintiff. It is the contention of plaintiff that the death of Shirck prevented his election, even though a majority of the votes were cast for him, and that the plaintiff therefore was the person who received the greatest number of votes. The argument is that the death of Shirck before the day of election created a vacancy upon the Democratic ticket, and that the statute points out the method by which such vacancy should have been filled, and that the failure of the party officials to adopt such method left the democratic ticket without a candidate, and rendered nugatory all votes which purported to be cast for the dead candidate. The following sections of the Code are involved:

Section 1087-a24 (Code, Supp. 1907):

Vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate, or from any other cause, shall be filled by the party committee for the county, district, or state, as the case may be, representing the party in which the vacancy nomination occurs.

(Section 1102:)

If a candidate declines a nomination, or dies before election day, or should any certificate of nomination or nomination paper be held insufficient or inoperative by the officer with whom it may be filed, or in case any objection made to any certificate of nomination, nomination paper, or to the eligibility of any candidate therein named, is sustained by the board appointed to determine such questions as hereinafter provided, the vacancy or vacancies thus occasioned may be filled by the convention, caucus, meeting or primary, or other persons making the original nominations, or in such a manner as such convention, caucus, meeting or primary has previously provided. If the time is insufficient for again

holding such convention, caucus, meeting or primary, or in case no such previous provisions being made, such vacancy shall be filled by the regularly elected or appointed executive or central committee of the particular division or district representing the political party or persons holding such convention, primary, meeting or caucus, and certified as hereinbefore provided. The certificates of nominations made to supply such vacancies shall state, in addition to the facts hereinbefore required, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and shall be signed and sworn to by the presiding officer and secretary of the convention, caucus, meeting or primary, or by the chairman and secretary of the committee, as the case may be.

(Section 1108:)

The name supplied for a vacancy by the certificate of the secretary of state, or by nomination certificates or papers for a vacancy filed with the county auditor, or city or town clerk, shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee, or, if the ballots have been printed, new ballots, whenever practicable, shall be furnished. Whenever it may not be practicable to have new ballots printed, the election officers having charge of them shall place the name supplied for the vacancy upon each ballot used before delivering it to the judges of election. If said ballots have already been delivered to the judges of election, said auditor or clerk shall immediately furnish the name of such substituted nominee to all judges of election within the territory in which said nominee may be a candidate, and such election officer having charge of the ballots shall place the name supplied for the vacancy upon each ballot issued before delivering it to the voter, by affixing a paster, or by writing or stamping the name thereon.

(Section 1170:)

All canvasses of returns shall be public, and the persons having the greatest number of votes shall be declared elected.

It is argued that a dead man is not a "person," within the meaning of section 1170. As a legal proposition, this may be conceded; but it does not become decisive of the case. It can properly be said that, because of his death, Shirck was not a "person having the greatest number of votes." This was the holding in *State v. Frear*, 144 Wis. 79 (128 N. W. 1068, 140 Am. St. Rep. 992), which is relied on by appellant. It can also be properly said that, because Shirck was not a "person" within the meaning of section 1170, the canvassing board could not declare him elected. On the other hand, though plaintiff was a "person" within the meaning of this section, yet, in an important sense, he did not have the "greatest number" of votes. It is quite clear to us that the case cannot be determined upon the mere terms of this section, because the contingency now confronting us was not within the contemplation of such section.

Turning to the sections above quoted relating to the filling of vacancies upon a ballot, it would be uncandid to hold, upon the facts appearing in this record, that it was a practical possibility for the party officials to have filled the vacancy in time for the opening of the polls. With one or two exceptions, none of these officials knew of the death until the following day and after the voting had begun. The precise question presented to us therefore is: Where a regular candidate dies only a few hours before election day, so that the time intervening between such death and the opening of the polls is so brief that fair compliance with the provisions of the statute for filling vacancies is impossible, and where the name of such dead candidate appears upon the official ballot at the time of the voting, and where the fact of his death is not generally known to the voters, and where a majority of the voters vote for him as a purported candidate, will the candidate having the next highest number of votes be entitled, as a matter of law, to claim his own election? This precise question is involved in some doubt. It has not frequently arisen, and the authorities are very few. Anal-

ogous questions, however, have arisen quite frequently, and the authorities thereon may be looked to for some light hereon.

It has not infrequently happened that ineligible candidates have been voted for by a majority of the voters. Though the candidate thus voted for by a majority cannot be declared elected because of his ineligibility, and the majority vote is thereby rendered ineffective for such purpose, yet it is quite uniformly held that such majority vote is effective to forbid the election of the candidate having the next highest number of votes. The effect of such majority vote is to render the purported election nugatory, and to leave a vacancy in the office thus attempted to be filled. *State v. Speidel*, 62 Ohio St. 156 (56 N. E. 871); *State v. Giles*, 2 Penney (Wis.) 166 (52 Am. Dec. 149); *State v. Tierney*, 23 Wis. 430; *Barnum v. Gilman*, 27 Minn. 466 (8 N. W. 375, 38 Am. Rep. 304); *Crawford v. Molitor*, 23 Mich. 341; *State v. McGeary*, 69 Vt. 461 (38 Atl. 165, 44 L. R. A. 446); *People v. Clute*, 50 N. Y. 451 (10 Am. Rep. 508); *State v. Freear*, 144 Wis. 79 (128 N. W. 1068, 140 Am. St. Rep. 992); *State v. Bell*, 169 Ind. 61 (82 N. E. 69, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203).

Some authorities make a distinction as between cases where the ineligibility of the candidate was generally known to the voters at the time of the voting and those cases where such ineligibility was not known. We have no occasion to deal with that distinction in the present case.

In cases where the candidate died upon election day, the authorities also seem to be uniform. If, in such a case, the majority or plurality of the voters vote for the dead candidate, such candidate cannot thereby be deemed elected. But such casting of the majority or plurality vote is nevertheless effective to prevent the election of the candidate having the next highest number of votes. *State v. Speidel*, 62 Ohio St. 156 (56 N. E. 871); *Howes v. Perry*, 92 Ky. 260 (17 S. W. 575, 36 Am. St. Rep. 591).

No case is brought to our attention holding otherwise on

this question, and appellant concedes such rule as here stated. The general reason underlying the foregoing decisions is that, though the vote of the majority cannot be given effect to the extent of electing an ineligible or dead candidate, because such election is legally impossible, yet that such majority vote is effective as an expression of the will of the voters, such will being thwarted by the unforeseen contingency, and that it is sufficient to negative a claim of election as against the minority candidate. The rule is a logical and reasonable one, at least where the voters are in ignorance of the disability. Under our present statutes, the voter receives the official printed ballot at the hands of public officials. He has a right to presume that the purported candidates are eligible and living. If the fact be otherwise, it presents a case analogous to fraud, accident, or mistake in civil transactions, and furnishes quite as persuasive a reason why the attempted election of a candidate in such a case should be deemed a nullity. We see no logical reason why the same rule should not be held fairly applicable to such a case as the one before us. It tends to the protection of majority rule, which is one of the fundamentals of our form of government. The appellant relies at this point upon *State v. Frear, supra*. In that case the validity of a nomination at a primary election was involved. The purported candidate, who received a majority of the votes, had died several days before the election was held. The fact of his death was universally known. The statutes of that state provided for the manner of filling the vacancy upon the primary ballot. No attempt was made to comply with these statutes. It was held that, under the provisions of the Wisconsin statutes, the candidate having the next highest number of votes was entitled to the nomination. We think the case is not sufficiently in point as to its decisive features to warrant us in deeming it as an authority to be followed in the case at bar. The conclusion reached therein was based upon the express terms of the Wisconsin statute, and upon the further fact that such

statutes were knowingly ignored by the party officials, and that the votes were cast with knowledge of the voters that the purported candidate was not living. We have no occasion, therefore, to agree or disagree with its reasoning or its conclusions. The closeness of the question presented in that case is indicated by the fact that the decision was by a divided court, four to three. If in the case at bar it appeared that the fact of Shirck's death was generally known to the voters, and especially if it appeared that there had been sufficient time since the death to comply with the statutory provisions as to filling vacancies in such cases, a materially different question might be presented. For our present purposes, we give that phase of the question no consideration, and therefore reach no conclusion thereon.

The conclusion which seems to us the rational one in the case at bar has definite support in *State v. Walsh*, 7 Mo. App. 142; *Howes v. Perry*, 92 Ky. 260 (17 S. W. 575, 36 Am. St. Rep. 591). The following excerpts from *State v. Walsh* will indicate the general nature of the holding:

Yet, unless we depart from the principle upon which the only sound rule rests, we must hold that the ballots upon which was the name of Mr. Miltenberger are properly counted, not for himself, for he was not in existence, but against this opponent, so far as to render a new election necessary. The relator had no plurality of votes. The will of the electors was declared against him. He is not 'the person having the highest number of votes,' to whom the certificate must, under the statute, be given; for these words imply that the successful candidate shall be the choice of the majority of voters who vote. Thus the case contemplated by the statute is not met. Through the death of one of the candidates immediately before the polls are open, an exigency arises not contemplated by the law, and the obvious consequence is a new election. It is not the accidental death of his opponent, but the votes of electors, which should give the certificate to a candidate. If it is true that a majority vote operates only to elect, and, failing of that, goes for nothing, then the most innocent mistake of fact on the part of the majority—as, the

age of a person voted for—might avail to elect a candidate who had received but a few scattering votes. It is said, on the other hand, that, if the American doctrine is correct, votes cast for a fictitious person avail to defeat an eligible candidate; that, if the voters choose to stay away, or, what is the same, throw away their votes, those votes should not be counted as against valid votes. The force of this argument lies in the assumption of an intent to throw away the vote. If the voter can make his vote effective only by voting in a certain way, and if the result of his voting in this way is to secure a new election, at which the majority can elect, how can it be assumed that the voter intended to throw away his vote? If the death of a candidate of a political party takes place, as here, immediately before the election, there is not time for organization or for preparing new ballots. Not only do our laws recognize primary organizations, and minutely describe what ballots shall be legal, but the modes of selecting candidates for political offices are parts of the customs of the country. If the sudden death of a candidate renders the votes of electors ineffective for some purpose, it is not therefore to deprive the voter of his vote. The majority are not obliged to fold their hands, nor are the minority entitled, because of the death, to prevail over the majority. Yet this would be the result if the majority vote is not to be counted against the minority candidate. But the majority of voters, so far from desiring or intending to throw their votes away, wish to use them to their utmost effect; and it is only by a fiction raised, if at all, by the law, that the majority in such cases throw their votes away. This presumption of an intent on the part of the voter that his vote should not, for any purpose, be effectual, any more than if it were blank paper, is, indeed, to a great extent, a fiction of the English courts, and political considerations have probably contributed to produce it.

Without fully committing ourselves to the reasoning above quoted, we are in accord with the conclusion reached, so far as applicable to the fact in the case at bar. The cited case was later followed by the same court in *Sheridan v. St. Louis*, 183 Mo. 25 (81 S. W. 1082, 2 Ann. Cas. 480).

Our citation of the foregoing Missouri cases is made with

the reservation already indicated, viz.: These cases treat the question of knowledge by the voters of the death or ineligibility of the candidate as not material. On this phase of the question we withhold opinion.

What we hold herein is that, where the death of a candidate before the day of election is so recent as to render it practically impossible to properly fill the vacancy, and where a plurality of the votes are cast for the deceased candidate without knowledge on the part of the voters generally that he is deceased, the plurality vote thus cast will be effective to prevent the election of another candidate for the same office having a lesser number of votes. The appellant herein was therefore not entitled to claim election, and his petition was properly dismissed.

Such order of the district court is therefore—*Affirmed*.

LADD, C. J., and WEAVER, GAYNOR, and PRESTON, JJ., concurring.

GUSTAV SCHMITT V. POSTAL TELEGRAPH CABLE COMPANY,
Appellant.

Telegraphs and telephones: DELIVERY: NEGLIGENCE: EVIDENCE. Evidence held to require submission of defendant's negligent delay in delivering a death message, addressed to the post office of the sendee and in care of the mail carrier on a certain rural route on which the addressee lived.

Same: MEASURE OF DAMAGES. The measure of damages for negligent delay in the delivery of a telegram in this state, forwarded from another state, is governed by the law of the forum and not that of the foreign state.

Same: NEGLIGENT DELAY: RIGHT OF ACTION. An action either upon contract or tort can be maintained for negligent delay in the delivery of a telegram.

Appeal from Calhoun District Court.—HON. M. E. HUTCHINSON, Judge.

TUESDAY, APRIL 7, 1914.

ACTION for damages resulted in judgment against defendant, from which it appeals.—*Affirmed.*

E. C. Stevenson, for appellant.

W. E. Gray and *M. W. Frick*, for appellee.

LADD, C. J.—I. Iva Schmitt, who was eight years old, and had lived at the Orphans' Home, Hoyleton, Ill., since her mother's death, became sick with "blood poison" August 14, 1912, and, as recovery seemed doubtful, the superintendent delivered to the defendant's agent at that place at 9:45 o'clock a. m. of August 24, 1912, for transmission to her father, the following telegram: "Hoyleton, Ill., 8—24—1912. Gustav Schmitt c/o Rural Route 4. Rockwell City, Iowa, via Fort Dodge, Iowa. Iva is very sick, come at once. J. H. Koenig." The telegram reached Ft. Dodge, Iowa, at 12:45 o'clock p. m. of the same day, and an effort was made to reach the sendee at Rockwell City by telephone. Defendant's employees testified that the operator at that place reported no one of that name was on rural route 4; that she inquired at the post office, hotels, and business places, but no such person was found. They then requested the operator at Hoyleton, Ill., for a better address, and were directed to deliver to "Rural Mail Carrier Route No. 4." This was not sent until the next day at 10:35 o'clock in the forenoon, and at about the same time another telegram was sent: "Gustav Schmitt c/o Rural Mail Carrier Route 4. Rockwell City, Iowa via Fort Dodge, Iowa. Iva died yesterday, be buried Monday 1 p. m. J. H. Koenig."

The first message was mailed at Ft. Dodge in an envelope

addressed to Schmitt at Rockwell City in the forenoon of August 25th, and the second one in the afternoon of the same day, and both were delivered to him at the home of Frank E. Conrad, where he was employed as a laborer on rural route No. 4, about three and one-half miles from Rockwell City, at 1 o'clock p. m. of the 26th. Other evidence tended to show that, had any one inquired at the post office in Rockwell City, he would have been informed that Schmitt lived at Conrad's house; that, had the telegram been delivered to the mail carrier as directed, he would have telephoned to Schmitt at once, as Conrad had a telephone in his house connected with Rockwell City; and that, had the message been delivered on the 24th, Schmitt would have reached Hoyleton in time for the funeral, which occurred at 2 o'clock on the 26th, and, if delivered Sunday, he would have had the funeral delayed until he could have attended. No question is raised, as there could not well be, but that the issue of unreasonable delay was for the jury. It was not important that defendant's line did not extend beyond Ft. Dodge, for it undertook to deliver on rural route 4 out of Rockwell City. The address directed the place of inquiry. Had this been made at the post office, according to the postmaster, Schmitt's location would have been given. Had the officers of the post office not known his whereabouts, the mail carrier could have given the information, and quite naturally would have been the person an intelligent inquirer would next have sought. The expenses of delivery had been guaranteed by the sender, and the jury might well have found the defendant was guilty of a breach of duty in failing to promptly deliver.

II. Counsel for appellant argue that, inasmuch as the telegram was delivered for transmission in Illinois, the measure of recovery would be governed by the laws of that state, and, as thereunder damages are not allowed for mental anguish disconnected from physical injury, the verdict should have been for defendant. Were this an action *ex contractu*, little difficulty would be experi-

2. SAME: measure
of damages.

enced in determining the point, but, as the action is one sounding in tort, it would seem the law where the breach of duty occurred would determine the measure of damages, though authorities are not wanting which hold that, as the wrong grew out of and is based on a breach of contract, the *lex loci contractus* should prevail. This, however, is too narrow a view, for it overlooks the fact that the breach is of a public duty owing by the telegraph company as a common carrier of intelligence. This was pointed out by Mr. Thompson in his work on Electricity, where it is said: "The true view which seems to sustain the right of action in the receiver of the message or in the person addressed where it is not delivered, is one which elevates the question above the plane of mere purity of contract and places it where it belongs, upon the public duty which the telegraph company owes to any one person beneficially interested in the message, whether the sender or his principal, where he is agent, or the receiver, or his principal, where he is the agent." Section 427, Thompson on Electricity.

This court is committed to the doctrine that either an action *ex delictu* or *ex contractu* may be maintained for a breach of the company's duty to transmit promptly. *Cowan v. Telegraph Co.*, 122 Iowa, 379; *Wells v. Telegraph Co.*, 144 Iowa, 605; *Mentzer v. Tel. Co.*, 93 Iowa, 752.

3. SAME: negligent delay: right of action.

Moreover, section 2162, Code, declares that: "Any person employed in transmitting messages by telegraph . . . must do so with fidelity and without any unreasonable delay." Section 2163, Code. The proprietor of a telegraph line is "liable for all mistakes in transmitting or receiving messages made by any person in his employment, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform the foregoing or any other duty required by law." The particular breach of contract occurred in this state, though of a contract made in the state of Illinois. The negligence occurred in this state,

though it consisted in breaching a duty undertaken in that state. The wrong complained of, occurring in Iowa, consisted of a violation not only of the defendant's duty as a common carrier of intelligence but of defendant's statutory duty as well, and, according to the great weight of authority and sound reason, the measure of the sendee's recovery was properly held to be governed by the laws of this state. *Western Union Tel. Co. v. Hill*, 163 Ala. 18 (50 South. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058); *Gray v. Tel. Co.*, 108 Tenn. 39 (64 S. W. 1063, 56 L. R. A. 301, 91 Am. Rep. 707); *Howard v. Western Union Tel. Co.*, 119 Ky. 625 (84 S. W. 764, 86 S. W. 982, 7 Ann. Cas. 1065); *Western U. Tel. Co. v. Ford*, 77 Ark. 531 (92 S. W. 528); 27 Am. & Eng. Ency. of Law (2d Ed.) 1079. See 37 Cyc. 1712. See, also, *Brewster v. Ry. Co.*, 114 Iowa, 144; *Dorr Cattle Co. v. Des Moines National Bank*, 127 Iowa, 153.

There is nothing in *Markley v. W. U. Tel. Co.*, 151 Iowa, 612, to the contrary. It does lay down the rule that recovery for damages may be had in the state from which the telegram is sent, although not recoverable in the state where it was to be delivered, even though the breach were in the latter state, saying: "No matter whether the action be *ex delictu* or *ex contractu*, the duty owing by the defendant was a public one growing out of contract, and the measure of damages, as a rule, is governed by the law of the forum or the *lex loci contractus*." In such a case the law is the same, and what was added excludes any possible misconception: "The question would be much more difficult if the action were brought in the state allowing such recovery upon a contract made in a state where no such recovery is permitted"—a case like that before us. There was no error in the ruling of the trial court, and that the measure of damages was that of the forum.

We are not inclined to regard the damages allowed excessive.

These are the only points raised in the appellant's open-

ing argument, and we are not permitted to review those raised in the reply for the first time.

There was no error and the judgment is—*Affirmed*.

WEAVER, EVANS, and GAYNOR, JJ., concurring.

IN THE MATTER OF THE GUARDIANSHIP OF WALTER RUMMELS,
A PERSON OF UNSOUND MIND. PAUL P. CLARK, Guardian.

Guardianship: REMOVAL OF GUARDIAN: DISCRETION. The removal of a guardian is a matter addressed to the discretion of the court which hears the application and the evidence, and the order entered will not be reversed on appeal unless an abuse of such discretion is shown.

Appeal from Montgomery District Court.—HON. O. D.
WHEELER, Judge.

WEDNESDAY, APRIL 8, 1914.

APPLICATION by the ward, Walter Rummels, and J. M. Halbert for the removal of the guardian. The trial court, after hearing the evidence, refused the order prayed for, and the said Rummels and Halbert appeal.—*Affirmed*.

Paul W. Richards, for appellants.

T. J. Hysham, for appellee.

WEAVER, J.—The ward is the owner of 1,100 acres of land in Montgomery county which the guardian has leased to one Andum, husband of the ward's sister. The only other near relative of the ward is his father, who is also under guardianship. There was evidently some dissatisfaction on part of the ward with the guardian's management, and the

matter finally culminated in this application for an order of removal.

The grounds on which the removal of the guardian was asked are stated at considerable length in the pleadings. Summarized, they are, so far as material, that the guardian has wasted the estate, has permitted some of the improvements to deteriorate, has not obtained as high a rental for the lands as he reasonably might have done, and that on one occasion complaint to the court was found necessary to secure proper order upon the guardian to perform his duties in this respect, and that he fails and neglects to observe the order so made.

These allegations are denied by the guardian, who further tenders explanation concerning certain matters complained of in the application.

There is no occasion for prolonging this opinion to set out the testimony. The trial court heard it all, and found no fault on part of the guardian of such gravity as to require his removal. We have held that the removal or retention of a guardian is a matter committed to the discretion of the court which hears the application and the evidence offered in its support, and the order so entered will not be reversed on appeal, unless an abuse of that discretion is shown. See *Guardianship of Nelson*, 148 Iowa, 118, and authorities there cited.

The record discloses nothing which would justify us in holding that the trial court so clearly failed in its duty in the premises, or that its judgment so clearly works a palpable injustice, that its order ought not to be permitted to stand. Indeed, our examination of the testimony convinces us that the complainants have failed to establish the material allegations of their petition. Whether the best interests of the ward's estate requires a change of tenants, or whether the rental fixed by the order of court is adequate under all the circumstances of the case, are matters which are under the immediate supervision of the trial court. That court is in far better position than we are to understand the merits of

these disputes, and, so far as we can judge from the parts set forth in the abstracts, its orders have been fairly well calculated to conserve the estate of the ward.

We find no occasion to interfere with the order appealed from, and it is—*Affirmed*.

LADD, C. J., and EVANS and PRESTON, JJ., concurring.

EMMA ASHER, Appellee, v. CITY OF COUNCIL BLUFFS, IOWA,
Appellant.

Municipal corporations: DEFECTIVE STREETS: NEGLIGENCE. A city is
1 not liable merely because of defects or obstructions in its streets
made reasonably necessary by the work of improving the same.

Same: NEGLIGENCE: EVIDENCE: SUBMISSION OF ISSUES. It is the duty
2 of a city to maintain a portion of the street at the side, while the
center was torn up for the purpose of laying street railway tracks,
in as safe a condition for travel as was consistent with the work of
improvement. In the instant case the evidence is held to warrant
submission of defendant's negligence in permitting holes in the
surface of the traveled portion of the street, into which plaintiff's
horse stepped, causing her to be thrown from the buggy and injured,
and also to warrant submission of plaintiff's contributory negligence.

Appeal from Pottawattamie District Court.—HON. E. B.
WOODRUFF, Judge.

WEDNESDAY, APRIL 8, 1914.

ACTION for damages resulting from an accident upon defendant's street. Negligence is charged against the defendant in failing to maintain such street in safe condition for travel. There was a verdict for plaintiff, and the defendant appeals.—*Affirmed*.

Tinley, Mitchell & Pryor and *D. E. Stuart*, City Solicitor, for appellant.

I. N. Flickinger, Clifford Powell and *H. V. Battey*, for appellee.

EVANS, J.—The accident involved in this suit occurred at or near the intersection of Eighth street and Avenue C of the defendant's streets. Eighth street runs north and south, and at the time of the accident, and prior thereto, was occupied by a street railway track. The street was torn up in the course of improvement by the street railway company, which was then engaged in double tracking its line along this street. For the purpose of such improvement, the paving along the center line of the street was taken up for a width of sixteen feet. Within such zone the double tracks were laid upon ties whose ends extended about one foot in each direction beyond the line of the rail. The excavation along the center line, over which the rails and ties were hung, was eighteen inches deep. On each side of the excavation a strip of paving was left undisturbed of about ten feet wide. However, the strip along the west side was fully obstructed and occupied with building material and material resulting from the excavation. On the east side the ten-foot strip was kept open for the purpose of public travel. Avenue C extended west from Eighth street. It had no extension to the east thereof. The plaintiff and her husband, riding in a buggy drawn by one horse, came towards Eighth street from the west along Avenue C. They crossed Eighth street over some temporary bridging that had been laid thereon, and were in the act of turning south to pass along the ten-foot strip of paving on the east side when they observed at some distance a team coming toward them on the same strip. Thereupon the husband undertook to back his vehicle so as to enable the team to pass by. In this effort the horse stepped into a hole in the paving near the east rail. The horse became

frightened thereby, and the plaintiff's husband temporarily lost control of him, whereby the plaintiff was thrown out of the buggy and seriously injured. The following statement from appellant's brief incorporates the salient facts concisely:

Statement.

North Eighth street in the city of Council Bluffs runs north from Broadway, taking a due north and south course. Broadway is the principal east and west street of the city. West of Eighth street, and north of Broadway, the east and west streets are lettered as avenues, commencing with the first street north of Broadway known as Avenue A, and continuing on to and including O. East of Eighth street, and north of Broadway, the streets running east and west, and substantially parallel with Broadway, are as follows: Washington avenue, Mynster street, and Mill street. The east and west streets on each side of Eighth street do not connect; that is, Washington avenue intersects Eighth street about one hundred feet north of Avenue A, Mynster street intersects Eighth street about one hundred feet north of Avenue B, and Mill street intersects Eighth street about one hundred feet north of Avenue C. A short time before the date of the accident in question, to wit, April 27, 1911, the Omaha & Council Bluffs Street Railway Company commenced the construction of a double-track street railway line at the intersection of Broadway and Main streets, purposing to so construct a line for a distance of eight blocks. About 2 o'clock on the afternoon of April 27, 1911, appellee, Emma Asher, in company with her husband, Daniel Asher, who was doing the driving, started for the main portion of Council Bluffs, leaving their home on the corner of Sixteenth street and Avenue O about 2 o'clock in the afternoon. They drove east to Ninth street, which is a street one block west of Eighth street, and parallel with it; thence south on Ninth street to Avenue B, intending to turn east on Avenue B. They observed, however, that Avenue B was blockaded, and travel along it cut off. They observed the street railway in process of construction along Eighth street at Avenue B (Abstract, page 20, lines 16-19). The testimony of the plaintiff's husband shows that he drove up Avenue B to Ninth street, which he found blockaded, and that he turned north on Ninth street to Avenue C, and then

noticed a team coming out across Eighth street going west on Avenue C. He and the plaintiff were then between Eighth and Ninth streets going east on Avenue C. They continued going east on Avenue C until Eighth street was reached, and then noticed the temporary crossing of ties, and that the crossing was in pretty bad shape. The ties were laid between the tracks. The paving was torn out. They noticed that on the west side of Eighth street, and south of Avenue C, the material from the paving had been piled, obstructing the use of that side of the street (Abstract, 17). The west side of Eighth street south of Avenue C was blocked with stuff so completely that they could not use that side of the street. After they had driven across the temporary crossing, the plaintiff's husband looked up and saw a single buggy coming from Washington Avenue North on the east side of Eighth street. The plaintiff's husband tried to back the horse, but was unable to do so. He then got out of the buggy and backed the horse probably five feet until the left wheel of the buggy struck the curbstone, and the horse would back no farther. The brick paving had been taken out, leaving a sort of a saw edge. That when the plaintiff's husband could not back the horse any further, he pulled her forward, and to the left, and according to his testimony the horse caught her foot in the saw edge of the paving at the edge of the trench, and the horse got frightened and lunged straight across the tracks in the trench, throwing plaintiff out of the buggy (Abstract, page 18). The excavation for the rails was between sixteen and eighteen inches deep, and the trench was from twelve to fifteen feet wide (Abstract, page 19). Plaintiff's husband says that he does not know whether he noticed there were two street railway tracks being built in the street, but that he could see the tracks along there, and that he could not tell until he got up to where the tracks were laid, although he could have seen them had he looked. As he approached the crossing he saw the rails, and that there were two tracks the usual distance apart, and that the crossing was made of ordinary ties laid between the rails. He saw the crossing as he approached it, and it was in plain view (Abstract, 21). He saw the trench when he turned south, saw the width of the driveway, and that the bricks were taken up. When he got out of the buggy he observed the exact condition. He then turned the horse enough and so close to the edge of the

trench that he stepped in over the edge, and then the horse pulled back a little and made a lunge across the track.

The foregoing is subject to some slight corrections which may be noted later.

The charge of negligence set forth in the petition is very broad, and not very definite. The substance of the charge is that the defendant negligently failed to maintain this traveled strip on Eighth street in a reasonably safe condition for public travel, and that it failed to warn the plaintiff of its actual condition.

The principal proposition argued by the appellant is that it was entitled to a directed verdict, and that the trial court erred in failing to sustain its motion to that effect. Its general contention is that the defects complained of were purely incidental to the work of improvement which was in progress thereon, and that such improvement was lawful and lawfully done, and that there was nothing which the city could have done consistently with the making of such improvement which would have rendered the street more safe than it was.

That the city was not liable for such tearing up of its streets as was reasonably necessary to the improvement in progress thereon is not seriously questioned.

1. MUNICIPAL COR-
PORATIONS: de-
fective streets: negligence. *Jones v. City of Clinton*, 100 Iowa, 333;
Gilcrest Co. v. Des Moines, 128 Iowa, 49; *Stevens v. Gas & Electric Co.*, 132 Iowa, 601; *Garnetz v. City of Carroll*, 136 Iowa, 570; *Pace v. Webster City*, 138 Iowa, 107.

The consideration of the case, therefore, must proceed upon the theory that the city was not liable for mere defects or obstructions in the street which were reasonably necessary to the work of improvement. The fact remains that it was the duty of the city to use reasonable diligence to maintain the traveled strip along the east side in as safe condition as was consistent with the work of improvement. The one defect which is pointed out is that at the western edge of the strip, and along

2. SAME: negli-
gence: evi-
dence: submis-
sion of issues.

the east side of the rail, there were triangular holes extending to the ends of the ties, presenting what is called a "zigzag" edge to the paved strip. It was into one of these holes that the horse stepped. They had been there for a long time. It was a question for the jury whether they were reasonably necessary to the work of improvement, and especially whether they should reasonably have been permitted to remain so long. They presented a continuing danger to travel on the paved strip, and needed to be actively avoided. The rail presented an apparent line of demarcation and an apparent boundary between the paved strip and the open trench. As against this, it is urged that the accident happened in daylight, and that the actual condition of the traveled strip was apparent to the plaintiff and her husband, and were apparent to them before they crossed the intersection. Upon this record, however, all this was fair jury argument, and no more. For the purpose of the present discussion, we must assume the facts as most favorable to the appellee. The evidence would justify a finding that these defects were not observable to the plaintiff or her husband until they came upon the strip; that it was apparent that travel was passing that way; that the bridging across Eighth street consisted of loose ties, and commanded the close attention of the driver while passing over it; that the turn south into the ten-foot strip was necessarily short, and had to be made within the space of the ten feet; that this necessitated the turning of the horse in that direction before the buggy itself came within the zone; that it was while in such act of turning, and after the horse had proceeded a few feet only, that the coming of the other team was discovered; that the position into which the plaintiff and her husband were thus drawn was one from which they could not extricate themselves except by backing; that there was no extension of Avenue C toward the east from Eighth street; that the plaintiff was in a position where he could not go forward except by turning and proceeding along this ten-foot strip of paving; that the situation was one which

was liable to occur at any time to any traveler, and one that ought to have been foreseen by the authorities; that in such a situation the danger from the triangular holes was intensified; that the dangerous condition of the paved strip in the respect indicated was not rendered apparent to plaintiff and her husband until they were already in the trap, and were meeting the emergency which confronted them.

The question of contributory negligence of the plaintiff and her husband was submitted by the court to the jury by instruction against which no complaint is made, except that it is claimed that they were guilty of contributory negligence as a matter of law. We reach the conclusion, however, that the defendant was not entitled to a directed verdict, either on the ground of contributory negligence of the plaintiff, or on the ground of absence of negligence on its own part.

Appellant has directed argument specifically against several of the instructions. We need not deal with these separately. The instructions complained of are consistent with our views above expressed. What we have already said, therefore, must be deemed as sufficient response to this part of the argument.

The judgment below is accordingly—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concurring.

CITY OF HARLAN, IOWA, Appellant, v. N. G. KRASCHEL,
Appellee.

Municipal corporations: REGULATION OF MOTOR VEHICLES: USE OF LIGHTS. A city ordinance substantially in accord with the statute, requiring that all motor vehicles operated or driven after dark shall display two lighted lamps in front and one in the rear, is not violated by temporarily leaving an automobile standing unoccupied at the side of a street after dark without such lights.

Appeal from Shelby District Court.—HON. A. B. THORNELL,
Judge.

WEDNESDAY, APRIL 8, 1914.

THIS action was begun in the mayor's court by information against the defendant for violation of a city ordinance regulating the use of motor vehicles upon the streets. From a judgment of conviction, the defendant appealed to the district court. The district court dismissed the information, and the plaintiff city has appealed.—*Affirmed.*

Smith & Gunderson, for appellant.

Shelby Cullison, for appellee.

EVANS, J.—The offense charged against the defendant in the information was the violation of section 6 of a certain ordinance of the city regulating the use of motor vehicles. Such section was as follows:

Section 6: Every motor vehicle *operated or driven* upon the streets or public highways of the city, shall be provided with adequate brakes, in good working order, and sufficient to control such motor vehicle at all times when the same is in use, and a suitable and adequate bell, horn or other device for signaling, and shall during the period from one-half hour after sunset to one-half before sunrise, display two lighted lamps on the front and one on the rear of such motor vehicle, which rear lamp shall also display a red light visible from the rear (provided that each motor cycle and motor bicycle shall be required to display but one lighted lamp on the front of such motor cycle or motor bicycle) the rays of such rear lamp shall shine upon the number plate carried upon the rear of such vehicle in such a manner as to render the numerals thereon visible for at least fifty feet *in the direction from which the motor vehicle is proceeding*. The light or lights of the front lamps shall be visible at least five hundred feet *in the direction in which the motor vehicle is proceeding*.

The foregoing section is a substantial copy of section 18 of chapter 72, Acts 34th General Assembly.

The case was tried in the district court by agreement upon the information and a stipulation of facts; the defendant, by consent, interposing a demurrer to the information as aided by the stipulation of facts. Such stipulation of facts was as follows:

That at the time alleged in the information said automobile was left standing on the public streets of the city of Harlan without lights, either front or rear, and more than one-half hour after sunset; that said car was headed in towards the curb of said street, so that the rear thereof extended out into the street, and said automobile was not parallel with the curb, but at an angle of about seventy-five degrees therewith; that the engine on said automobile was not running; that there were no occupants in said car; that said automobile had been standing as aforesaid for a period of from five to fifteen minutes before the arrest of the defendant herein; that during such time the defendant was not in said automobile, but had left the same immediately upon stopping it in the position aforesaid; that immediately preceding the stoppage of the car in the position aforesaid the defendant had been therein, and had been moving the same about the streets of Harlan by its own motive power, and later continued moving it about by its own motive power. It is not claimed that said automobile was moving without lights.

The defense urged is twofold: (1) That the facts as set forth in the information and in the stipulation do not show a violation of the terms of the city ordinance or of section 18, chapter 72, Acts 34th General Assembly; (2) that the ordinance in question is void as being an attempt by the city to regulate the use of motor vehicles in violation of the prohibition of section 21 of such chapter 72, Acts 34th General Assembly, such section 21 being as follows:

Except as herein otherwise provided, local authorities shall have no power to pass, enforce, or maintain any ordi-

nance, rule or regulation requiring from any owner to whom this act is applicable any fee license or permit for the use of the public highways, or excluding any such owner from the free use of such public highways, excepting such driveways, speedways, or roads as have been expressly set apart by law for the exclusive use of horses and light carriages or in any other way regulating motor vehicles or their speed upon or use of the public highways; and no ordinance, rule or regulation contrary or in any wise inconsistent with the provisions of this act, . . . shall have any effect: Provided, however, that the power given to local authorities to regulate vehicles offered for hire, and processions, assemblages or parades in the streets or public places, and all ordinances, rules and regulations which may have been or which may be enacted in pursuance of such powers shall remain in full force and effect, and provided further, that local authorities may set aside for a given time a specified public highway for speed contests or races, to be conducted under proper restrictions for the safety of the public; and provided further, that local authorities may exclude motor vehicles from any cemetery or grounds used for the burial of the dead, and may by general rule, ordinance or regulation exclude motor vehicles used solely for commercial purposes from any park or part of a park system where such general rule, ordinance or regulation is applicable equally and generally to all other vehicles used for the same purpose: Provided further, that local authorities of cities and towns may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways, such speed limitations not to be in any case less than one mile in six minutes, and the maintenance of a greater rate of speed for one-eighth of a mile shall be presumptive evidence of driving at a rate of speed that is not careful and prudent, and on further condition that each city or town shall have placed conspicuously on each main public highway where the city or town line crosses the same, and on every main highway where the rate of speed changes, signs of sufficient size to be easily readable by a person using the highway, bearing the words 'City of ———,' 'Town of ———'; 'Slow down to ——— miles' (the rate being inserted), and also an arrow pointing in the direction where the speed is to be reduced or changed, and also on further condition that such ordinance, rule or regulation shall fix the punishment for a violation thereof, which punishment shall, during the existence of such

ordinance, rule or regulation, supersede those specified in section twenty-three.

In the quotation of section 6 of the ordinance above set forth, we have italicized certain portions thereof for convenience of reference. We think the italicized portions indicate the proper construction to be put upon such ordinance for the purpose of this case, and likewise determine the proper construction of section 18 of chapter 72 already referred to.

It will be noted that the ordinance and statute in question by their terms purport to apply to motor vehicles when "operated or driven upon the streets or public highways." It is stipulated in this case that the defendant's car was temporarily "left standing" at one side of the street. It was not in "operation" nor being "driven." The contention of the plaintiff is that a standing car under the circumstances shown is being "operated or driven" within the meaning of the statute and ordinance. It is clear that a standing car is not being operated or driven in a literal sense. There is nothing in the further context of the section that aids the contention of the plaintiff, or invites any other construction than that implied in the literal terms above quoted. The requirement alleged to have been breached is the requirement for lights. Under this section such lights must be exhibited in front and rear on every motor vehicle "operated or driven" on the streets. These requirements also call for two front lamps "visible at least five hundred feet in the direction in which the motor vehicle is proceeding," and one rear lamp carried in such a manner as to render the number plate "visible for at least fifty feet in the direction from which the motor vehicle is proceeding."

A standing car is not in the ordinary sense being "operated or driven"; neither is it "proceeding" in any "direction." The distinction made as between one rear light and two front lights is suggestive of a moving vehicle. Otherwise there would be no consistency in the difference of require-

ment as to front and rear. The expressions, "in the direction *from* which the motor vehicle is proceeding," and "in the direction *in* which the motor vehicle is proceeding," are also suggestive of movement, and are not consistent with the contrary view.

It is to be noted, also, that there is no more reason why a standing motor vehicle should display lights than that any other vehicle should do so. Granting that public safety would be to some extent promoted by the requirement that all standing vehicles in public streets should display lights at night, there is no apparent reason for any distinction between one vehicle and another of equal capacity for obstruction. Nor would there be in such a case any apparent reason for requiring stronger lights in front than in the rear. It is clear to us that the terms of the statute and of the ordinance will not bear the construction contended for by the appellant. The trial court, therefore, properly dismissed the information; no violation of the terms of the ordinance being shown.

This conclusion renders it unnecessary that we pass upon the validity of the ordinance, and upon the question whether its enactment by the plaintiff city was in violation of the prohibitions of section 21 of the statute in question.

The judgment of the trial court is accordingly—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concurring.

S. A. HOYT, Appellee, v. L. E. GRIGGS; O. M. HOBBS, Appellee,
and EDITH C. PARK, EXECUTRIX OF THE ESTATE OF D. H.
PARK, DECEASED, Appellant.

Appeal: FINDINGS OF FACT: CONCLUSIVENESS. The findings of fact by
1 the court in a law action when supported by the evidence are not
reviewable on appeal.

Negotiable instruments: SURETY: EVIDENCE. Where a note does not
2 disclose the fact that the liability of one of the signers was that of
surety that question must be determined by other evidence, either

as between the principal and sureties or as between the sureties themselves. In the instant case the evidence is held to show that the liability of one signer was secondary to that of the other.

Same: CO-SURETIES: AGREEMENTS AS TO LIABILITY. It is competent
3 for the signers of a negotiable instrument to agree between themselves that one shall be primarily liable and the other liable secondarily.

Same: ASSIGNMENT: PRESUMPTION AS TO TITLE. Where the only con-
4 troversy in a suit upon a promissory note by the assignee arose between the sureties over their relative liability, and the note was introduced by plaintiff without objection or question as to his right to recover, and the principal debtor made no defense, the circumstances were presumptively sufficient to show the assignment.

Same: TAXATION OF ATTORNEY'S FEE. There is no statutory authority
5 for the allowance of attorney's fees upon a promissory note by the supreme court, and a motion to that effect will be overruled where the plaintiff failed to file the statutory affidavit in the district court.

Appeal from Carroll District Court.—HON. M. E. HUTCHINSON, Judge.

SATURDAY, APRIL 11, 1914.

ACTION at law upon a promissory note against two defendants as signers thereof, and against the executrix of a third signer. The case was tried to the court without a jury. There was a judgment for plaintiff against all the defendants. It was also found by the court, and such finding was incorporated in the judgment, that the signer Griggs was the principal maker, and that the two other signers were sureties, and that as between such two sureties, Park was primarily liable and Hobbs only secondarily liable. Park, having died before the trial, was represented by the executrix of his estate, who has appealed from the judgment below.

Chas. C. Helmer, for appellant, Park.

M. A. Hoyt, for appellee, Hoyt.

Brown McCrary, for appellee, Hobbs.

EVANS, J.—There was no defense to the note by any defendant as against the plaintiff. It was agreed also that Griggs was the principal debtor. Hobbs filed an answer, and cross-bill, wherein he averred, in substance, that he signed the note under an agreement with Park and the other parties thereto that his liability as surety should be secondary to that of Park. The material issue in the case was made upon this averment. No oral evidence was introduced. The death of Park precluded evidence by the parties to the suit of personal transactions with him. Certain circumstances and writings were relied upon solely in support of the allegation, and the trial court found them sufficient to sustain the cross-petition of Hobbs. Briefly stated, the circumstances shown were as follows: The note sued on was as follows: “Carroll, Carroll County, Iowa. September 14, 1910. \$350.00. On September 14, 1911, after date we promise to pay M. A. Hoyt or order three hundred and fifty and 0-100 dollars for value received *in renewal of note No. 3625* for us with interest at the rate of eight per cent. per annum. . . . L. E. Griggs. O. M. Hobbs. D. H. Park. P. O. Carroll & Lake City, Iowa.” “Note No. 3625,” which is referred to in the note above set forth, was a previous note for a like amount which had fallen due on July 1, 1910, and which had been executed by Griggs and Park as payors to Hobbs as payee. Hobbs had transferred the note to M. A. Hoyt, with a guaranty of payment. It is conceded that this note, which appears in this record as Exhibit B, was the consideration for the note in suit. It was further made to appear that Hobbs signed the note in suit about November 28, 1910, in pursuance of the following written request by Park: “Dear Sir: Mr. Hoyt will give Griggs a year’s time on that note so I think by that time he can pay it as I will have a lot of work for him & will get it out of him. So please sign the note with him & then I will sign it and send you the old note, and oblige, D. H. Park. Carroll, Iowa, Nov. 28, 1910.”

The action is at law and the findings of fact by the

trial court are not subject to review if supported by evidence.

1. APPEAL: findings of fact: conclusiveness.

We think the circumstances referred to furnish sufficient support to the finding of fact; such finding being warranted as a fair inference from such circumstances.

It is clear that the liability of Hobbs as a guarantor on the first note was secondary to that of Park. This fact does not determine the relative liability of Hobbs on the note in

2. NEGOTIABLE INSTRUMENTS: suretyship: evidence.

suit, but it is an important circumstance as bearing upon the question of fact put in issue by the pleadings. We think, also, that the clear implication of the written request from Park to Hobbs was that Park would protect Hobbs. The argument for appellant is that the liability of Hobbs is to be determined under the second note, and not under the first. It was stipulated upon the trial that the second note was executed in settlement and satisfaction of the first. Stress is laid by the appellant upon the form of this stipulation as being something more than a mere renewal. We do not deem the distinction decisive of this case. As a legal proposition, it is true that the liability of Hobbs must be determined under the terms of the note in suit. The question of fact is still subject to inquiry as to whether Hobbs was liable as principal or surety, and, if as surety, whether he was necessarily a co-surety with Park.

The question of suretyship is not ascertained or determined by the terms of the note but may be inquired into notwithstanding the silence of the note thereon. This rule is elementary, and it is unnecessary to cite authorities thereto.

It is conceded in this case that both parties were sureties. It does not necessarily follow that sureties for the same obligation are co-sureties. It was competent for Park to agree that

3. SAME: co-sureties: agreement as to liability.

he would be primarily liable as between him and Hobbs. 32 Cyc. 14-18; *Sponhaur v. Maloy*, 21 Ind. App. 287 (52 N. E. 245). The case, therefore, turns upon this question of fact. As already

indicated, we think the findings of the trial court are sufficiently supported.

II. It is urged by appellant that there was no proof of the assignment of the note by the payee thereof to the present plaintiff. There was a general denial contained in the answer of the appellant. At the trial no controversy was made as to the right of the plaintiff to recover as against all the defendants. No defense was made by the principal defendant. No formal evidence was offered of the ownership of the note by the plaintiff. The record discloses various colloquies between the court and counsel on the trial, all of which implied that the only question in the case was that between the two sureties, which we have considered in the foregoing division. The attention of the court was in no manner directed to any defect of title in the plaintiff. The payee of the note appeared in the case as attorney for the plaintiff. The note was introduced in evidence as that of the plaintiff without objection. The principal debtor has not appealed, nor did the appellant serve a notice of her appeal upon him. The plaintiff was in court with the original note in her possession. A written assignment was not essential to a transfer of title. We think the facts thus appearing upon the record were presumptively sufficient, and that the point here made is not available to the appellant.

III. The plaintiff as appellee files a motion for the allowance of attorney's fees in this court. If such motion were otherwise permissible, it does not appear that the plaintiff's rights have been in any manner jeopardized by this appeal, unless it be in the contention that her title was not proved. Her motion asks that the attorney's fees be taxed in favor of the attorney for the appellee, Hobbs, who also has appeared for the plaintiff, Hoyt. It may be added that there is no statutory authority for the taxation of attorney's fees in this court upon a promissory note. The plaintiff would have been

4. SAME: assignment: presumption as to title.

5. SAME: taxation of attorney's fees.

entitled to their taxation in the district court under the terms of the note if she had filed the statutory affidavit. She failed to do so, and for that reason no taxation was made in her favor there. The motion for taxation here will be overruled.

IV. In view of our conclusion upon the merits of the case, we need not consider appellee's motion to dismiss the appeal. The judgment below will be—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concur.

LYDIA FRENCH, Appellee, v. BARTEL & MILLER, Appellants.

Quieting title: JUDGMENT: HOMESTEAD. An action to quiet title
1 against the lien of a judgment will lie, although the property involved is the homestead of plaintiff, against which the judgment could not be enforced.

Same: TAXATION OF ATTORNEY'S FEE. Where plaintiff tendered a quit
2 claim deed with the statutory fee before bringing suit to quiet the title to her homestead against the lien of a judgment, the taxation of the statutory attorney fee was proper, although the judgment was not enforceable against the homestead and defendants were not seeking to enforce the same.

Same: QUIT CLAIM DEED: EFFECT. The execution of a quit claim deed
3 to relieve a homestead of the apparent lien of a judgment does not involve the surrender of any future right to levy upon the property in case its homestead character is lost its only effect would be to make apparent the fact that the plaintiff's homestead right antedated the judgment and the indebtedness upon which it was founded, thus rendering the property exempt from execution.

Appeal from Council Bluffs Superior Court.—HON. S. B. SNYDER, Judge.

SATURDAY, APRIL 11, 1914.

SUIT in equity to remove cloud on the title to plaintiff's homestead; such cloud arising because of the apparent lien

thereon of a judgment held by the defendants against the plaintiff. There was a decree for the plaintiff, and the defendants appeal.—*Affirmed.*

H. V. Battey, for appellants.

W. H. Killpack, for appellee.

EVANS, J.—The case was tried upon a stipulation of facts. Only questions of law are presented for our consideration.

I. The defendants' first contention is that a suit to quiet title under the statute will not lie to remove the cloud of a merely apparent lien.

1. QUIETING TITLE:
judgment:
homestead.

Under the stipulation of facts it is conceded that the property described in the petition is the plaintiff's homestead, and that it has been such for many years, and that the defendants' judgment against her is not a lien thereon. On the other hand, the validity of the judgment is conceded. It is argued by counsel, therefore, that the judgment is not an interest or right nor an apparent interest or right in or to the plaintiff's homestead, and that therefore it does not come within the terms of the quieting title statute. Code, sections 4223-4226.

This argument is based wholly upon the terms of the statute. The question, however, is quite foreclosed by some of our previous cases. *Blair v. Hemphill*, 111 Iowa, 226; *Anderson v. Plow Co.*, 101 Iowa, 747. In the latter case a decree was rendered quieting title against an apparent lien by attachment. In the *Blair* case it was said:

An action to quiet title is now an equitable proceeding in the nature of a remedy *quia timet*, and the rule is without exception that by bills of that character clouds of every description may be removed from title. . . . Code, section 4223, provides: 'An action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein,

against any person claiming title thereto, though not in possession.' It is argued that this expressly provides that the action can be brought only against one who claims title. This is a very narrow construction of a statute giving an equitable remedy. But the following section shows, as we think, that the language quoted has no such restricted meaning. It provides that the petition shall pray that the defendant be barred and estopped from having or claiming 'any right' adverse to plaintiff.

The foregoing is quite conclusive on the proposition that the action will lie.

II. The trial court taxed an attorney fee of \$10 against the defendants under the provisions of section 4226; the plaintiff having brought herself within the provisions of such section before the beginning of her suit. Such section is as follows:

2. SAME: taxation of attorney's fee.

Section 4226. If a party, twenty days or more before bringing suit to quiet a title to real estate, shall request of the person holding an apparent adverse interest or right therein the execution of a quitclaim deed thereto, and shall also tender to him one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and if he shall refuse or neglect to comply therewith, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may, in its discretion, if the plaintiff succeeds, tax, in addition to the ordinary costs of court, an attorney's fee for plaintiff's attorney, not exceeding twenty-five dollars, etc.

It is urged by appellants' counsel that this case does not come within the provisions of such section, because the judgment against the plaintiff was in all respects valid, and the defendants were entitled to enforce the same against non-exempt property, and because, further, the defendants were not attempting to enforce the same against the homestead. It is argued that to have executed the quitclaim deed presented to them by plaintiff in advance of suit would have been

to relinquish existing legal rights, and the same would have barred them from enforcing their judgment in the future against this particular property, even though its homestead character might be abandoned by the plaintiff.

Section 4226 appears as a part of the Code chapter on quieting title. If the quieting title statutes are available to the plaintiff to remove the cloud of defendants' apparent lien, it would seem to follow quite logically that section 4226 is available also. The purpose of section 4226 is not to require any apparent lienholder to relinquish any actual beneficial right. Its purpose is to take away from the holder of an apparent lien or right which is such in appearance only, and not in fact, the arbitrary power to maintain a cloud upon the title of another to his injury, and thereby to drive the title holder to the alternative of incurring the expense of a formal quieting title suit on the one hand, or on the other of paying under practical duress a price to the holder of the apparent lien for a relinquishment of the apparent right.

In the case before us plaintiff's title to her homestead was manifestly clouded by the judgment lien to such an extent as would naturally affect the salability of the property. The judgment of the defendants was dated October 14, 1911. This was prior to the acquisition by plaintiff of the legal title to her homestead. She acquired this on October 23, 1911. Prior to this the legal title had been in her husband for many years, and the property had been occupied as a homestead by husband and wife for many years. The plaintiff acquired the legal title through a court decree in a divorce proceeding. Whether the occupancy of the homestead antedated the original indebtedness upon which the judgment was entered against the plaintiff did not appear upon the records until the institution of this suit. The plaintiff was not only entitled to occupy her homestead as such free and clear of any lien of such judgment, but she was also entitled to sell the same with the same exemption while the homestead character continued. If this action were not available to her in advance of a sale to

adjudicate her title as clear from the judgment in question, then she was without remedy to satisfy the reasonable apprehensions and objections of an intending purchaser.

If the defendants had executed the quitclaim deed presented to them for that purpose, the status of plaintiff's title to her homestead would have been thereby settled without other expense, and the defendants would have relinquished nothing but the cloud of the apparent lien. It is not correct to say that by the execution of a quitclaim deed the defendants would have surrendered the future right to levy upon the particular property in case it should be abandoned by plaintiff as a homestead. A quitclaim deed does not operate upon rights subsequently acquired. Nor would the execution of a quitclaim deed by the defendants as demanded by the plaintiff have stood in the way of a levy upon the property in the future in case the homestead right should be abandoned. The effect of such a quitclaim deed would have been to make apparent the fact that the plaintiff's homestead right antedated the judgment and the indebtedness upon which it was founded. This was the only relief asked in the petition. The relief granted in the decree was as follows:

Wherefore, it is considered, ordered, adjudged, and decreed by the court that the property hereinbefore described is the homestead of plaintiff, that she is entitled to hold the same as such as the head of a family, that the judgment of plaintiff is not a lien on said property, or any part of it; and it is further ordered, adjudged, and decreed by the court that the said property hereinbefore described is absolutely free and clear from the apparent lien of the judgment of defendants hereinbefore mentioned, and they are not entitled to enforce the same against plaintiff's said property, or any part thereof, and any and all clouds which the said judgment creates upon plaintiff's title are hereby removed and set aside, and said property is hereby declared free and clear from any apparent lien or cloud upon the title created by said judgment. It is further ordered, adjudged, and decreed that

3. ~~SAME~~: quit-
claim deed:
effect.

plaintiff have and recover of and from the defendants in this case the costs of this action taxed at \$——, and an attorney's fee in addition thereto in favor of plaintiff's attorney, W. H. Killpack, in the sum of \$10.00, and that execution issue herein against the defendants for said costs and attorney's fees.

We reach the conclusion that the decree was proper in all respects, including the taxation of the attorney's fee. In view of this conclusion, we need not pass upon appellee's motion to dismiss the appeal.

The decree entered below is accordingly—*Affirmed*.

LADD, C. J., and WEAVER and PRESTON, JJ., concurring.

FRED BLUMER, Appellee, v. CHARLES SCHMIDT, JR., Appellant.

Negotiable instruments: CONSIDERATION: PAROL EVIDENCE: VARIANCE

1 **OF WRITING.** Where a note and written contract were executed as parts of the same transaction, the contract purporting to be the consideration for the note, which was plain and unambiguous and unimpeached for fraud or mutual mistake, evidence in a suit upon the note by an assignee that the consideration was other than that recited in the contract, or that it had failed, was inadmissible; as the assignee was not a stranger to the transaction in a legal sense so as to render oral evidence in contradiction or explanation of the writing admissible.

Same: CONSIDERATION: EVIDENCE. Where defendant pleaded the af-

2 firmative defense that there was no consideration for the note in suit, or that the consideration had failed, plaintiff was entitled under his denial by operation of law to offer in evidence a written contract, made as part of the same transaction as the note and purporting to be the consideration therefor.

Same: PAROL EVIDENCE: FRAUD, ACCIDENT AND MISTAKE. Where fraud,

3 accident or mistake is alleged respecting a written contract, parol evidence is admissible to prove the allegations; but if insufficient for that purpose the contract will stand and be enforceable according to its terms, regardless of such evidence.

Trial: TRANSFER TO EQUITY: PREJUDICE. Where the defendant was
4 in a better position to appeal from a judgment in a law action than
he would have been to appeal from a decree in equity, any error
in refusing to transfer the cause to the equity side of the docket for
the purpose of permitting him to bring in other parties was harm-
less.

Appeal from Pottawattamie District Court.—HON. THOMAS
ARTHUR, Judge.

SATURDAY, APRIL 11, 1914.

ACTION upon a promissory note for \$1,100, executed by
the defendant to John Blumer, as payee, and transferred by
the payee to the plaintiff. An affirmative defense of mistake
and failure of consideration was pleaded. There was a
directed verdict for the plaintiff, and the defendant appeals.—
Affirmed.

A. L. Preston, for appellant.

I. D. Shuttleworth and G. W. Cullison, for appellee.

EVANS, J.—The affirmative answer of the defendant was
voluminous and consisted of several amendments. The fol-
lowing quotation from the first amendment will be sufficient
to indicate the general nature of the defense:

That prior to April 29, 1909, one John Blumer and de-
fendant and one Charles Schmidt, Sr., and one E. L. Schmidt
were stockholders in the Schmidt Department Store, a corpo-
ration organized under the laws of Iowa, and that each of said
four parties owned an equal amount of the stock of said cor-
poration. That said corporation was engaged in the general
mercantile business in Avoca, Iowa. That on or about April
29, 1909, the said corporation, by and with the consent of all
the stockholders, traded their stock of goods and merchandise
to one Johnson for three-quarter sections of land in the state
of South Dakota. That the title to said land, by agreement
of all the stockholders, was taken in the name of this defend-
ant as trustee for all the stockholders with the understanding
that the same should be sold on the market, the accounts

of the different stockholders should be adjusted and balanced. and the proceeds from the sale of said real estate distributed among the stockholders in proportion to their respective shares, after the adjustment of individual accounts and after the payment of other indebtedness of the said company for wholesale accounts and moneys borrowed. That thereupon the said corporation went out of business. That at the time the said corporation had large amounts of money outstanding against the customers of the business, and the said accounts were by agreement of all stockholders left in the hands of this defendant for collection, with the agreement and understanding that collections made by this defendant should be accounted for to the respective stockholders and taken into account in the final distribution of the proceeds from the sale of said real estate after the payment of the indebtedness of the company. That the note in suit was given by this defendant to said John Blumer as the estimated value of the net interest of the said John Blumer in the said real estate and accounts. That the said South Dakota real estate has not been sold because of the poor condition of the real estate market in South Dakota, but still stands in the name of this defendant. That a large amount of the outstanding accounts referred to remain uncollected and are uncollectible. That this defendant has paid a large amount of the indebtedness of the said corporation out of his own individual funds, of which amount the said John Blumer should pay his proportionate share. That this defendant has spent much time and money in collection of accounts belonging to the said corporation, and that he is entitled to a reasonable compensation therefor. That \$600 would be a fair and reasonable compensation for such services, of which amount said John Blumer should stand his proportionate share. That the net value of the interest of said John Blumer in the assets of the said company after the payment of the company's indebtedness does not exceed \$2,000. That, at the time said company went out of business, the said John Blumer was indebted to the company on his individual account in the sum of \$860.68, which amount, with interest thereon amounting to \$100, making a total of \$960.68, should be deducted from the \$2,000 above named, leaving a balance of \$1,039.32. That, at the time of giving the note in suit, this defendant paid to said John Blumer the sum of \$500 in cash, to be applied on the amount coming to him out of the

company's business, and at the same time gave his other note for \$500 for the same purpose, which note has been paid. That, after deducting the \$1,000 so paid and the amount of this defendant's counterclaim set out in count 2 of the original answer, it will be found that the said John Blumer has received more than his entire share in the property of said corporation. That, because of the facts above stated, this defendant says that the consideration of the note in suit has wholly failed, and that nothing is due thereon. Defendant further states: That the note in suit was transferred by the said John Blumer to the plaintiff herein without consideration and before maturity and for the purpose of defrauding this defendant. That this defendant has at all times stood ready and willing to make full accounting for the property in his hands belonging to the said stockholders of the said Schmidt Department Store and to pay whatever amount may be found due to the respective stockholders.

The note sued on contained the clause "transferable to Fred Blumer only." The trial court held that this clause opened the note to the defendant's defense as against the plaintiff, as transferee thereof. Over appropriate objections, defendant introduced his own oral testimony tending to support the allegations of his affirmative answer. The substance of such testimony was that the note was not intended as a promise to pay but was intended only to evidence a tentative estimate of what would become due to the payee out of the proceeds of property of the Schmidt Department Store; that, in the light of subsequent events, nothing was due such payee; but that, on the contrary, he had been overpaid. It developed, however, upon the cross-examination of the defendant, that at the same time the note was executed a written contract was entered into between the parties to the note, and that the note was given in connection with such contract. Such contract, being identified by the defendant as a witness, was offered in evidence by plaintiff's counsel. Such contract was as follows:

This contract made and entered into this 29th of July, 1910, by and between Charles Schmidt, Jr., party of the first

part, and John Blumer, party of the second part, witnesseth: That the party of the first part pays to the party of the second part the sum of \$2,100 for the consideration hereinafter given, as follows, to wit: Five hundred dollars cash, receipt of which is hereby acknowledged, five hundred dollars payable November 1, 1910, and the sum of eleven hundred dollars payable twelve months from the date of this contract; the said payments to be made November 1, 1910, and the payment twelve months from date of said contract to be evidenced by two promissory notes drawing 6 per cent. interest from date. In consideration of the above payments the said party of the second part hereby releases all claims of any kind and character that he may have against the Schmidt Department Store, and this contract shall be full and complete settlement of all claims that the parties herein have against each other by reason of being stockholders in the Schmidt Department Store. Dated this 29th day of July, 1910. [Signed] Charles Schmidt, Jr., John Blumer.

The defendant then resting his evidence, the plaintiff moved to strike his parol evidence as incompetent and moved for a directed verdict. The motion was sustained. Under

1. NEGOTIABLE INSTRUMENTS: consideration: parol evidence: variance of writing. the evidence of the defendant, the note sued on and the written contract were parts of the same transaction and of the same contract.

They were not impeached for fraud nor for a mistake that was mutual. These writings are plain and unambiguous in their terms. The evidence of the defendant, which is relied on in support of his affirmative defense, is clearly contradictory to the plain terms of these writings. The written contract which purports to be the consideration for the note in suit is known in the record as Exhibit 10. This contract was not pleaded by either party, but it was directly involved in the issue made on the question of the consideration for the note and the alleged failure thereof. The appellant contends that he was not precluded from contradicting the terms of Exhibit 10 because the plaintiff was not a party to such contract. The appellant invokes the rule that, as between a party to a written instrument and a stranger

to such instrument, oral evidence is admissible to contradict or explain such instrument. *Clark v. Shannon*, 117 Iowa, 645; *Livingston & Shaller v. Stevens*, 122 Iowa, 62; *Aultman Engine Co. v. Greenlee*, 134 Iowa, 368. This rule, however, is not available to the appellant, because the plaintiff herein is not a "stranger," in a legal sense, to the written contract involved. He holds his cause of action by assignment from John Blumer, and stands in the shoes of his assignor. He became bound by the terms of his assignor's contract; and to the same extent the other party to the contract became bound to him as assignee. The rights and obligations of the assignee and the other party to the contract are mutual in the same sense as were the rights of the original parties. The reason why a party to a written instrument may contradict it by parol as against a stranger thereto is that such stranger was never bound by the obligations of the written contract and was and is himself free to contradict it by parol evidence as against a party thereto. The reason of the rule is absent in such a case as the one at bar, and the rule itself is therefore not applicable.

In the state of the record, therefore, the trial court properly gave effect to the terms of the note and the written contract in pursuance of which it was executed, and refused to give effect to oral evidence in contradiction thereof. It necessarily follows that the verdict was properly directed.

II. It is urged by appellant that Exhibit 10 should not have been considered because it purported to be a settlement, and that no settlement had been pleaded by the plaintiff. The contract did not purport to be a settlement of the note sued on. On the contrary, the note was given in pursuance of, or as a part of, the contract. The defendant's affirmative defense of no consideration and failure of consideration was denied by operation of law. Exhibit 10 was admissible under such denial. It completely negatived the claim of the defendant

2. SAME: consideration: evidence.

as to what the original consideration was and as to the failure of such consideration.

III. It is next urged that, where fraud, accident, or mistake is alleged respecting a written instrument, parol evidence is admissible, although it may have the effect to contradict the terms of the instrument itself.

3. SAME: parol evidence: fraud, accident and mistake.

Officer v. Howe, 32 Iowa, 142; *Van Dusen v. Parley*, 40 Iowa, 70. Under such rule, however, the parol evidence is admissible only to prove the fraud, accident, or mistake, and thereby to impeach the contract. If the parol evidence, when introduced, is insufficient to prove fraud, accident, or mistake, the contract will stand and will be enforceable according to its terms, regardless of the parol evidence. In the case at bar the parol evidence was not sufficient to sustain a finding of fraud, accident, or mistake. In the absence of such finding, the parol contradictions cannot be weighed as evidence against the provisions of the written contract.

IV. Error is predicated upon a question of practice as to whether the trial court should have transferred the case to the equity side, and whether it should have permitted the defendant to bring in John Blumer and other

4. TRIAL: transfer to equity: prejudice.

parties. In view of our conclusion upon the merits of the case, it is unnecessary that we go into this question. For the purpose of appeal, the defendant was in a better position to appeal from an order directing a verdict against him than he would have been to appeal from a decree in equity. In the light of our present holding, therefore, the appellant suffered no prejudice at that point.

We reach the conclusion, therefore, that the order of the trial court must be—*Affirmed*.

LADD, C. J., and WEAVER and WITHROW, JJ., concur.

C. C. KAUFMAN, Appellee, v. J. W. LENKER ET AL., Appellants.

Drainage: RIGHTS OF LANDOWNER. While a landowner may drain into a natural water course or depression on his own land which will carry the surface water into a natural watercourse without liability for damages to others, he is not authorized to divert water in ponds on his own land away from its natural course, by cutting channels through a natural barrier and discharging it upon or close to the lower lands of an adjacent owner. Nor can he discharge surface water upon the land of another at a place different from its natural flow, or in materially increased quantities.

Appeal from Cedar District Court.—HON. F. O. ELLISON,
Judge.

TUESDAY, APRIL 14, 1914.

ACTION in equity to enjoin the defendants from casting surface water upon plaintiff's land. The defendants pleaded that they had the right to do so, under the law, and, under the issues joined, the case was tried to the court, resulting in a decree for plaintiff, and defendants appeal.—*Affirmed.*

Chas. W. Kepler & Son, for appellants.

Chas. B. Kaufmann and John T. Moffit, for appellee.

DEEMER, J.—This is a controversy between the proprietors of adjoining tracts of land regarding the right of the defendants to drain certain ponds upon their own land through an eight-inch tile onto and upon the lands of the plaintiff.

The defendants' lands lie north of and abut upon the lands owned by the plaintiff, and the general course of drain-

age is toward the south and southeast; the land of plaintiff being slightly lower than that belonging to the defendants. On defendants' north forty acres there are two ponds, one with an area of two and three-tenths acres, to what is called the overflow line or depression No. 1, and the other, known as depression No. 2, consists of one and four-tenths acres of land to the overflow line. The overflow from this last depression is into No. 1. The amount of ground draining into these two depressions is something like twenty-six acres. There is a natural rim around these ponds, as already indicated, and south and southeast from pond or depression No. 1 there is a natural barrier or ridge, and, while the testimony is in some conflict, it seems that the surface water never overflowed this ridge.

In the year 1892 the defendants laid a five-inch tile from these ponds south and southwest through a part of plaintiff's land, and westward through the lands of one Bolly to what was known as Otter creek. This tile was laid as nearly as could be along the natural course of drainage. It did not, however, drain all the water from the ponds, and in the year 1907 defendants laid another large eight-inch tile from pond No. 1, southeasterly through their own land, to within three feet of the line fence between their own and plaintiff's land. The inlet was laid in the bottom of the pond, and it ran through the natural barrier before indicated, and at its outlet was two feet one inch below the surface of the ground.

At the outlet of the tile, the defendants, to protect their own land from erosion and the water as it boiled up, constructed a cement abutment level with the top of the ground, which has wings ten feet long extending either way, and it is about two and one-half feet from the top of the cement abutment to the bottom of the tile. As before stated, the eight-inch tile passes through a ridge or natural barrier of at least two and one-half feet, and, although the tile extends 1,165 feet, the fall is only three-tenths of a foot per one hundred feet. As a result of the eight-inch tile being laid,

large bodies of water have been cast on the plaintiff's land after freshets and heavy showers, which never before reached said land; and at a point where water did not flow even after freshets. The eight-inch tile not only cast water in an unduly increased amount and in an unnatural manner, but also where there was no natural water course.

The eight-inch tile has caused a ditch to be cut on the plaintiff's land. At the outlet the width of the ditch is five feet; ten feet down the ditch is seven and one-half inches deep, and from edge to edge is about sixteen feet; and five hundred feet down the ditch disappears and the water spreads over a vast area of the plaintiff's land, and the ground is only four and one-half inches lower than at the outlet. The surveyor testified: "Yes, sir; I intend to convey to the court the idea that this eight-inch tile is what caused the washing of the ditch."

Before the eight-inch tile was laid, there was no ditch or water course at the outlet of the eight-inch tile. At the present time there are no other ditches on the plaintiff's west twenty, because the land is practically level. The water was cast in an unnatural manner and in an unduly increased amount by the defendants upon the plaintiff's premises, to the material injury of the plaintiff estimated at from \$30 to \$40 per acre in the value of the land. There was no ditch or water course over plaintiff's land until the eight-inch tile was put in, and it was cultivated all the time before defendants turned the water thereon.

The main feature in the case is that, before the eight-inch tile was put in, no water from either pond ever passed over or upon plaintiff's land, and, in order to make it flow in that direction, defendants were compelled to cut a ditch something like forty inches deep, to get the water across a barrier which nature had erected to cause it to flow upon the lands of the plaintiff. That this has greatly damaged him the evidence tends strongly to show. Defendants, however, contend that they had the right to carry the water in this

direction, and through the tile, in virtue of section 1989-a53 of the Code Supplement, reading as follows: "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation." The difficulty with this contention is that it is not applicable to the facts. The tile did not follow the natural course of drainage, but cut through a barrier and carried the water where it did not theretofore go. Moreover, it was not discharged into any water course or natural depression.

Whilst we have been very liberal in the application of the rules with reference to the disposition of surface water, we have never held that one may collect and discharge it at a place other than nature intended it to go, and have at all times adhered to the rule that one must so use his own as not to unnecessarily injure and damage another. So long as he follows the natural course of drainage, and discharges the water into a natural depression or water course, from which it will be carried into some natural water course, he will be protected, if the drainage is wholly on his own land. But he cannot divert water from its natural flow or from the course nature intended, cut through natural barriers, and discharge the water upon or close to his neighbor's land.

In *Sheker v. Machovec*, 139 Iowa, 1, we said: "Where, by means of tile drains, the owner of the higher land discharges upon the lower land water from an area which would otherwise not have been drained across the lower land, or at a point where the water from the higher land would not naturally have been discharged upon the lower land to the material injury of the latter, then, according to the uniform current of authorities in this state, beginning with the leading case of *Livingston v. McDonald*, 21 Iowa, 160, reaffirmed in

Vannest v. Fleming, 79 Iowa, 638, and many subsequent cases, the owner of the higher land is liable in damages." See, also, to the same point: *Baker v. Akron*, 145 Iowa, 485; *Valentine v. Widman*, 156 Iowa, 172; *Martin v. Schwertley*, 155 Iowa, 347; *Matteson v. Tucker*, 131 Iowa, 511; *Parizek v. Hinek*, 144 Iowa, 563; *Hull v. Harker*, 130 Iowa, 190.

None of the cases cited and relied upon by appellants run counter to these rules.

The decree seems to be correct, and it is—*Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

HENRY L. WHITE, Appellee, v. INTERNATIONAL TEXT BOOK Co., and O. O. CRANE, Appellants.

Exemplary damages: INSTRUCTION. Exemplary damages are punitive
1 in character and are not recoverable as a matter of legal right. The allowance of such damages depends upon a finding of actual damages and is a matter of discretion with the jury. In the instant case the instruction that the jury should allow plaintiff such punitive damages as it might believe just and right, instead of submitting such allowance to the jury's discretion, was erroneous.

Same. An instruction authorizing recovery of exemplary damages
2 should specify the conditions under which the jury may make the allowance. In an action for malicious prosecution an instruction authorizing recovery of such damages merely on proof of the implied malice necessary to make the prosecution wrongful was erroneous.

Damages: INSTRUCTIONS: EVIDENCE. An instruction authorizing the
3 jury to allow plaintiff damages for loss of time, if any, was not erroneous on the ground that there was no evidence of loss of time.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

TUESDAY, APRIL 14, 1914.

ACTION for malicious prosecution. Trial to a jury. Verdict and judgment for plaintiff in the sum of \$2,800, and defendants appeal.—*Reversed*.

F. L. Anderson and D. C. Harrington, for appellants.

John N. Hughes and C. R. Sutherland, for appellee.

DEEMER, J.—This is the fourth appearance of the case in this court. For former opinions, see 144 Iowa, 92; 150 Iowa, 27, and 156 Iowa, 210. The nature of the case, the issues, and the facts relied upon by either party are sufficiently stated in the former opinions. It is sufficient to say that the action is for malicious prosecution, and the damages awarded manifestly included exemplary damages. Indeed, under an instruction given by the trial court, the jury was bound to award such damages. That instruction reads as follows:

If you find for the plaintiff, then you are instructed that you should allow him by way of damages: (1) Such expenses as he was put to as shown by the evidence, if any, because of such arrest; (2) the loss of time and value thereof, if any; (3) the injury, if any, to his business; and (4) such sum as will in your judgment fairly and reasonably compensate him for the humiliation, mental anguish, and distress of mind he suffered, if any, including the distress and anguish of mind caused by the humiliation and disgrace he felt, if any, at being arrested on the charge of embezzlement and confined in the city jail, as you, as reasonable men, believe the evidence will fairly compensate him therefor; (5) you will also allow him, in addition to the above, such sum by way of exemplary damages, that is by way of punishment to the defendants for the wrong done to the plaintiff, if any, as you, as fair-minded men, believe is just and right, but the total amount of your verdict must not exceed \$5,000. But you will not allow plaintiff any damages for loss of time caused by the defendants discharging him from their employment before the arrest.

Under well-settled rules established by an unbroken line of authorities, this instruction was erroneous. *Sheik v. Hobson*, 64 Iowa, 146, and an exhaustive collection of cases found in *Fink v. Thomas*, 66 W. Va. 487 (66 S. E. 650, 19 Ann. Cas. 574).

Save as provided by statute, exemplary damages are never recoverable as a matter of legal right. Whether or not they shall be allowed in any case depends: First, upon a finding of actual damages; and, second, upon whether or not the jury, in the exercise of a wise discretion, believes they should be assessed, not as compensation for the wrong done, but as punishment to the wrongdoer. Exemplary damages are punitive in character, and do not follow as a result of the wrong done. It is within the discretion of the jury to allow or to disallow them, even though defendant's wrong be malicious, oppressive, wanton, willful, or reckless; and it is erroneous for the court to direct the jury to allow them as a matter of right. See cases collected in 12 Am. & Eng. Enc. of Law (2d Ed.), page 51; 1 Sedgwick on Damages, section 357; 1 Joyce on Damages, section 118, and cases cited; *Fink v. Thomas*, *supra*.

The instruction is in no manner qualified, save by the expression "for the wrong done to the plaintiff, if any." In other words, the only qualification was that such damages should be assessed unless the jury found that no wrong was done to the plaintiff.

Again the instruction was faulty in that it failed to specify the conditions under which the jury might allow such damages. Under the instruction as given, plaintiff was entitled to recover exemplary damages, although nothing else was shown, save the malice which was necessary to make the prosecution wrongful. In other words, the jury was instructed to allow exemplary damages, although no other malicious conduct was

1. **EXEMPLARY
DAMAGES: in-
struction.**

2. **SAME.**

shown, except that expressed in the seventh instruction, reading as follows:

Malice, in law, may be expressed or implied. Express malice is that disposition of a depraved heart that makes itself manifest toward the object of its dislike or hatred and is shown by acts, expression, and other outward manifestations, whilst implied malice is that condition of the heart that is presumed to exist in one who did or is doing a wrongful, illegal, and willful act toward another. And, in case of an action for malicious prosecution like the present, it may be inferred when one, without probable cause for believing another guilty of a crime, causes his arrest and detention. If you find from a preponderance of the evidence that the prosecution of Mr. White was without probable cause and not justified by the facts, then malice may be inferred therefrom.

That this was erroneous, see cases hitherto cited, and *Stevens v. Friedman*, 58 W. Va. 78 (51 S. E. 132); *Hendrickson v. Kingsbury*, 21 Iowa, 379; *Williamson v. Western State Co.*, 24 Iowa, 171; *Jeffries v. Snyder*, 110 Iowa, 359; *Curl v. Railroad*, 63 Iowa, 417. The following cases also support the conclusions reached: *Goodenough v. McGrew*, 44 Iowa, 670; *Root v. Sturdivant*, 70 Iowa, 55.

II. It is also contended that the instruction is erroneous in that there was no testimony as to injury to business, and no claim in the petition for loss of time. As to
 3. DAMAGES: In-
 structions:
 evidence. loss of time, the qualification in the instruction by the use of the words "if any" cured the defect. *Lamb v. City*, 108 Iowa, 629, 635; *Fischer v. Bolton*, 148 Iowa, 651, 654.

There is more difficulty with the proposition that the court was in error in submitting the question as to loss of time and in receiving testimony over defendants' objections as to the amount thereof, because there was no claim made in the petition for such damages. We would not reverse on this ground alone, but call attention to the matter in order that,

if the allegations of the petition be not amended, the error will be avoided on a retrial.

No other error appears; but, for the ones pointed out, the judgment must be, and it is—*Reversed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concur.

JAMES M. HAYES ET AL., Appellees, v. DORA OYER, Appellant.

Drainage: HIGHWAYS: DAMAGES. The owner of a servient estate is
1 bound to take the surface water naturally flowing thereon; and under the statutes providing for the drainage of highways the township authorities, if necessity requires, may construct culverts across the highway and dig ditches on either side thereof, and so long as they do not thus divert the water from its natural course they are within their rights in so doing; and although the water is thus collected in a more closely confined channel and discharged upon the servient estate, no damages will be implied from any resulting injury.

Same: WATERCOURSE: ACQUIESCENCE: OBSTRUCTION. Where the owner
2 of a servient estate many years ago constructed a ditch across his land connecting with the system of drainage for the highway provided by the township authorities, thus conducting the water in the natural course of drainage across his land, and defendant maintained the same for a long series of years prior to the commencement of this action to restrain the obstruction of the highway ditches, such conduct amounted to acquiescence in the system of drainage thus established, and the same constituted a water course which defendant was not at liberty to obstruct.

Same: DRAINAGE EASEMENT: USER. Where defendant and her grantors
3 knowingly permitted the construction and maintenance of highway ditches, and for a long series of years maintained a ditch connecting therewith across her land, which was the servient estate, she could not deny the existence of an easement for the maintenance of the highway ditches which discharge the surface water upon her land, on the ground that an easement cannot be shown by proof of user alone.

Same: DRAINAGE SYSTEM: ESTABLISHMENT BY CONSENT. Where the
4 owners of both the dominant and servient estates unite in the construction of a drainage system, which is continued for more than

the statutory period, the scheme becomes perpetual and cannot be changed without the consent of all parties interested.

Appeal from Linn District Court.—HON. F. O. ELLISON,
Judge.

TUESDAY, APRIL 14, 1914.

SUIT in equity by certain township trustees to enjoin the defendant from maintaining a dam in a ditch on the south side of a highway adjoining defendant's land, thereby casting the water upon the highway and into ditches alongside thereof, making the said highway muddy, sticky, and at times impassable. Judgment for damages was also asked, and a mandatory writ was demanded for the removal of the obstruction. The defendant's answer was a general denial, and on the issues thus tendered the case was tried to the court, resulting in a decree for plaintiffs, without any allowance for damages, and defendant appeals.—*Affirmed.*

F. L. Anderson and Rickel & Dennis, for appellant.

Voris & Haas, for appellees.

DEEMER, J.—Plaintiffs are the trustees of a certain civil township, in Linn county, Iowa, within which township defendant owns a tract of land abutting upon a county highway. This highway was laid out about the year 1860, and in the year 1865 a wooden culvert was put across the road north of defendant's land to carry the surface water coming from at least 1,000 acres of land lying north and northwest from defendant's land across the road and onto defendant's land, in a course which nature provided. The flow was slow, and there were no natural banks, as to a stream, on either side of the culvert, for the land was low and flat, and the water spread out on defendant's land several rods in width. De-

fendant's land was the lowest in the vicinity, and her estate, in so far as surface water is concerned, is the servient one.

The culvert spoken of was put in at approximately the lowest place where the highway crossed the depression, was maintained and the highway graded accordingly until about the year 1906, when a cement culvert was put in in place of the old wooden one, and of approximately the same size, save that the grade of the highway was increased a little, and at the time of the commencement of this suit the highway was some two feet higher than the surrounding land. The traveled part of the highway was rounded, and on either side was a ditch, something like eighteen inches in depth. Something like thirty-five years before the commencement of this suit the then owner of the land now belonging to defendant constructed a ditch leading from the old culvert southwesterly over the land now owned by defendant. This ditch was from one to two feet deep and eight or ten feet wide. This ditch was there when defendant purchased the land, about nineteen years ago, and has been maintained ever since. Before this ditch was dug or plowed, the surface water spread out over the defendant's land, and the ditch was to confine it to a more narrow channel, and to reclaim some of the land under water.

In times of wet weather surface water has constantly flowed through the culvert and down the ditch. Shortly before the bringing of this suit, and on the 30th day of March, 1911, defendant, without permission from any one, closed up the ditch at the north line of her farm by erecting a dam across the north end of the ditch, and filling in for some distance below. This dam and the filling was brought up to a level with the surrounding land; but it had the effect of filling the ditches on either side of the highway, making the road soft and muddy. The water at times was practically on a level with the top of the grade, and its presence caused a falling away and crumbling of the soil. There is not a great

deal of dispute regarding the facts, and the matters already stated are well established.

Defendant says that she had the right to defend herself against surface water; that neither the trustees, the township, nor the county authorities had any right to cast the water upon her land in the way they did; that they

1. DRAINAGE:
highways: dam-
ages. thereby increased the flow to her damage; and that no easement of any kind existed by reason of user, or otherwise, authorizing the flow of the water upon her land in any other way or in greater quantities than nature itself provided. By section 1556 of the Code, and sections 1532-a and 1533 of the Code Supplement, township trustees have charge and supervision of township highways, and it is made the special duty of the highway authorities to use "strict diligence in draining the surface water from public roads to its natural channel, and to this end they may enter upon adjoining land for the purpose of removing obstructions from such natural channel that impede the flow of such water."

As already observed, defendant owns the servient estate, and her land was bound to take the water which naturally flowed thereon. The township authorities had authority, and it was their duty under the statute, to provide for the drainage of surface water from the highways. This of necessity compelled the building and maintenance of culverts across the roads, and the digging of ditches on either side thereof, and, so long as they did not divert surface water from its natural course, they were strictly within their rights in putting in the culverts, and digging the ditches, which were constructed at the point in question. This of necessity caused the water to be collected and to be discharged on the land now owned by the defendant, and, if any damage was done, it was *damnum absque injuria*. *Myers v. Priest*, 145 Iowa, 81; *Cech v. City*, 147 Iowa, 247.

Aside from this, it appears without dispute that defendant's grantor, after the construction of the culvert and the

ditches, dug a ditch across the land now owned by defendant, connecting it up with the water coming through the culvert, and carrying it in the general course that nature provided, south-westerly across his land, and that this ditch was dug more than thirty-five years ago; that it was maintained by him and by defendant, who has occupied the land for nineteen years, down until about the time of the commencement of this suit, when the dam was constructed, and the filling made. This conduct on the part of the defendant and her grantor amounted to acquiescence on their part in the establishment of the culvert and ditches, and an implied agreement that the water should be turned therefrom across the land. By reason thereof, it became a water course which defendant was not at liberty to disturb. *Hull v. Harker*, 130 Iowa, 190; *Brown v. Armstrong*, 127 Iowa, 175; *Dorr v. Simmerson*, 127 Iowa, 551; *Parizek v. Hinek*, 144 Iowa, 563; *Brown v. Honeyfield*, 139 Iowa, 414; *Falcon v. Boyer*, 157 Iowa, 745; *Schofield v. Cooper*, 126 Iowa, 334; *Vannest v. Fleming*, 79 Iowa, 638.

Defendant's contention that plaintiff's claim to an easement, which, it is said, is founded on user alone, cannot be established by mere proof of the user has no application.

It is true that under the present Code, section 3004, an easement cannot be established by proof of mere user alone. But plaintiffs here have proved much more than mere user, and knowledge thereof on the part of the defendant and her grantors. She or they not only had knowledge thereof, but they actively participated in the scheme for taking care of the water by digging a ditch on their own land, and connecting it up with the ditch in the highway, which the culvert was made to cross. This was done more than thirty-five years ago, and the situation remained practically the same down until shortly before the bringing of this suit.

To such facts, the statute relied upon does not apply. Originally there was a natural easement across defendant's

2. SAME: water-course: acquiescence: obstruction.

3. SAME: drainage easement: user.

land because it was the lower estate, and, when the owners of both the dominant and servient estates join in a scheme of drainage which was continued for more than the period of the statute of limitations, this scheme becomes perpetual, and could not be changed without the consent of the owners of the land. The new channel or ditches take the place of the original ones, and themselves constitute a water course which will be protected and enforced. This is familiar law, sustained by the following, among other, cases: *Mason City R. R. v. Board*, 144 Iowa, 10; *Chicago & N. W. R. R. v. Sac County*, 142 Iowa, 607. As the ditch became, in effect, a water course, defendant had no right to dam it up. *Wharton v. Stevens*, 84 Iowa, 107; *Dorr v. Simmerson*, 127 Iowa, 551.

That damage was done to the highway by the building of the dam, and the filling of the ditch, is well established. The dam caused the water to stand in the ditches at either side of the road, and to remain until evaporated, or until it disappeared by percolation. Its presence caused the traveled part of the road to become sticky and muddy, and also to crumble and fall.

The decree has ample support in the testimony, and it must be, and it is—*Affirmed*.

LADD, C. J., and GAYNOR and WITHROW, JJ., concurring.

M. BRANDEIS, Appellee, v. CHICAGO, BURLINGTON & QUINCY Ry. Co., Appellant.

riers: LIABILITY FOR LOSS OF PROPERTY. While a carrier may be held absolutely liable for the loss of property in transit, through the embezzlement or negligence of its servants, this rule of insurance does not apply where the damage results from the inherent character or quality of the shipment, and the only fault of the carrier is delay in shipment or delivery.

Same: PERISHABLE GOODS: SUBMISSION OF ISSUE. Where an action
2 for injury to a shipment of fruit was tried on the theory that
defendant was negligent in failing to place the car upon an un-
loading track within a reasonable time after its arrival at destina-
tion, and not upon the theory that defendant was liable for damage
as an insurer, the defendant could not complain of its submission on
the theory of negligence, on the ground that a carrier is not liable
as an insurer of goods of a perishable character.

Evidence: EXCLUSION: PREJUDICE. The rejection of evidence is not
3 prejudicial error, where immediately afterward the witness without
objection testified to the matter previously inquired about.

Appeal from Pottawattamie District Court.—HON. A. B.
THORNELL, Judge.

TUESDAY, APRIL 14, 1914.

ACTION to recover damages for delay in shipment and
delivery of perishable freight. Judgment for the plaintiff.
Defendant appeals.—*Affirmed.*

Wright & Baldwin, for appellant.

Kimball & Peterson, for appellee.

PER CURIAM.—The plaintiff brings this action to recover
damages to a carload of apples shipped upon defendant's
railway from Savannah, Mo., to Omaha, Neb. Plaintiff claims
that on the 20th day of August, 1910, he shipped a carload of
apples to Omaha; that the apples arrived on the 22d day of
August; that the company notified consignees of the arrival
of the apples, and they were ready for unloading; that, when
they went to unload the apples from the car, they found it on
the tracks of defendant company at a point where it was
impossible to unload it, and not upon the team tracks pro-
vided for that purpose; that plaintiff attempted to get the
company to place the car on the team track so that it could
be unloaded; that this the defendant failed to do. The neg-

ligence charged, as a basis for recovery against the company, is "that the defendant failed to place the car upon the team track, for the purpose of unloading, within a reasonable time after its arrival in Omaha, and failed and neglected to place the same at the disposal of the plaintiff within a reasonable time after the car had reached Omaha," and that by reason of the failure of defendant, as claimed, and without any fault on the part of the plaintiff, the apples became heated, and that when plaintiff was able to get possession of the same they were in such a condition that plaintiff was unable to sell them. There are other allegations of neglect; but for the purpose of this case, as presented here, this is sufficient to make plain the errors relied on for reversal.

It is first contended by appellant that the record in this case does not justify a verdict for the plaintiff; that to hold the defendant liable, under the record here made, would be to declare that, under the law, a railroad company is an insurer of the delivery of perishable goods, in a sound condition, at the place of destination. Attention is called to the distinction between the liability of a carrier for the loss of goods carried by theft or otherwise, and the liability of a carrier for injury to or loss of goods resulting from delay in transportation or delivery. Thus it is claimed that, while, from reasons of public policy, a carrier may be held to absolute liability for loss of goods entrusted to its servants for transportation, through embezzlement or negligence, on the ground that the party so intrusting the goods has no means of protecting himself, yet this rule of insurance does not apply where the injury or damage to the goods results to them from the inherent character or quality of the goods, and when the only fault, to which injury is traceable, lies in delay in shipment or delivery. We think that this distinction is well recognized in the books and by the prior decisions of this court.

In *Kinnick Bros. v. C., R. I. & Pac. Ry. Co.*, 69 Iowa, 669, this court said, in substance, that when the cause of damage,

1. CARRIERS: liability for loss of property.

for which recompense is sought, is connected with the character or propensities of the thing undertaken to be carried, the ordinary responsibility of carriers does not attach; that is, the responsibility of insurers. This distinction is well exemplified in the opinion of the Supreme Court of the United States, rendered in the *Caledonia Case*, 157 U. S. 124 (15 Sup. Ct. 537, 39 L. Ed. 644).

This case, however, was not tried nor submitted upon the theory that the defendant was an insurer against injuries resulting to them by reason of their perishable character, and

2. SAME: perish-
able goods:
submission of
issues.

the jury were distinctly told by the court that, to make the defendant liable, the burden rested upon the plaintiff to show, and that to

recover they must show, by a preponderance of the evidence, that the defendant was negligent, in not placing the car upon the track where it could be unloaded, so it could be unloaded, within a reasonable time after it had been received by the company at Omaha. The liability of the defendant was predicated upon the suggested duty of the railroad company to use ordinary diligence, ordinary care; not only in transporting the apples to Omaha, but in delivering the same to the consignee within a reasonable time after they had been received by the company, and the jury were told that the company was only required to use that care and precaution, in so doing, as is required of ordinarily prudent and cautious persons in respect to the same matters; that the care required of the defendant was commensurate with the known injuries likely to result from the want of care, and they were distinctly instructed that the company was bound to use only reasonable care to furnish reasonable facilities for delivery, and not extraordinary care, and they were told that if, at any time, there happens to be a congestion of business that could not be anticipated in the usual and ordinary course of business, it cannot be regarded as negligence, or lacking in ordinary care, in not providing for immediate handling of such extraordinary rushes of business; that they were bound to furnish

reasonable, and only reasonable, facilities for unloading. Indeed, the entire instructions, which are long and were delivered by the court orally, proceed upon the theory that there can be no liability in this case unless it is shown affirmatively that the defendant failed to exercise reasonable care in providing reasonable facilities for the delivery and in the delivery of these goods to the consignee, within a reasonable time, and that damages resulted by reason of such failure. We have examined this record with some care, and, while there is a sharp conflict in the evidence, there is sufficient as a basis for the verdict that was rendered here, and we find no error in the manner in which the case was submitted to the jury.

It is complained, however, that the defendant was entitled to show that the company had the necessary means and facilities in its yards and sufficient team tracks for handling

the amount of freight that ordinarily arrived
3. EVIDENCE: ex- in the city of Omaha, on the date it is claimed
clusion: preju-
dice. that this car arrived, and to that end the

following questions were asked one of the defendant's witnesses: "What are the facts as to whether or not, on August 22, 1910, the company had the necessary means and facilities in its yards and team tracks for handling the amount of freight that ordinarily arrives in the city of Omaha?" And whether or not, on the 22d day of August, everything was done to expedite the handling of cars on these team tracks.

These questions were objected to on the ground of incompetency and immateriality and as calling for the conclusion of the witness, and the objection was sustained. We are inclined to think that the objection was well taken, but, however this may be, no error can be predicated on the ruling for the reason that immediately afterwards the same witness said, without objection: "Well, there was not room to handle the ordinary business promptly during August, I think. I don't know how long, for quite a while, and during the rush of freight. On the 22d of August, everything was done that was possible to relieve the congestion, and as fast as cars were

emptied they were pulled out and loads set in. Every day that I was there, these tracks were full. I don't remember how long it was that way. I know that some of the cars stood there for ten days and longer. We allow the cars to stand there until the people unload them. If there were empty cars, I was instructed to notify the switching crew and when they were emptied. I don't know whether there was any empty cars on that track, any emptied cars on that day or not."

We find no error in the record, and the cause is—*Affirmed*.

LADD, C. J., and DEEMER, GAYNOR, and WITHROW, JJ., concurring.

GEORGE W. MUNROE, Appellee, v. MUNDY & SCOTT, M. L.
MUNDY and R. W. SCOTT, Appellants.

Sales: LIABILITY FOR PURCHASE PRICE: EVIDENCE. In this action to
1 recover the purchase price of a team of horses the evidence is held
to require submission of the question whether defendants bought
the team directly from plaintiff, or whether they merely guaranteed
payment therefor by another.

Same: EVIDENCE. Where plaintiff claimed that defendants were di-
2 rectly responsible to him for the price of a team of horses which
he delivered to another, evidence that he knew the other party to
be a man who did not meet his obligations was admissible to show
why he did not deal directly with such party rather than with
defendants.

Same: STATUTE OF FRAUDS: ORAL EVIDENCE. Where the purchasers of
3 a team under an oral contract directed its delivery to another, the
delivery to such party took the contract out of the statute of
frauds; and evidence of the sale was admissible although there
was no written memorandum.

Statute of frauds. A promise resting upon a new consideration be-
4 tween the parties, thus giving to the promisor some new advantage,
is an original undertaking and is not within the statute of frauds;
although the promise is to discharge the debt of another.

Sales: EVIDENCE: INSTRUCTION. Where it was claimed by plaintiff
5 that he sold a team direct to defendants, and by defendants that
the sale was to another, they simply guaranteeing payment therefor
to the extent to which they should become indebted to such claimed
purchaser, an instruction that the only issue in the case was whether
defendants were the purchasers was not erroneous as being an
undue restriction of the issues; as that was the only fact question
in the case, and proof that defendants simply guaranteed payment
of the debt would defeat recovery against them.

Appeal from Marshall District Court.—HON. CLARENCE
NICHOLS, Judge.

TUESDAY, APRIL 14, 1914.

ACTION to recover upon a contract of sale of a team of
horses. Defense that the sale was made to a third person and
not the defendants. Verdict for the plaintiff, and defendants
appeal.—*Affirmed.*

F. E. Northup, for appellants.

J. J. Wilson and *W. T. Bennett*, for appellee.

WITHROW, J.—I. Plaintiff's suit is based upon the claim
that in May, 1911, he entered into an oral contract with M. L.
Mundy, member of the firm of Mundy & Scott, by the terms
of which plaintiff was to deliver to one J. F. Doan a team
of horses to be used by said Doan in plowing land for Mundy
& Scott, and for which the defendants agreed to pay \$195
for the team within sixty days from date of the contract.
That in pursuance of such agreement the team was delivered
to Doan, and that the defendants have refused to pay for
the same as agreed by the contract. The defendants denied
the oral agreement, or that they in any manner rendered
themselves liable to pay plaintiff for the team. They further
claim that on or about the date stated they had entered into
a contract with Doan to break certain land for them, and

that at the request of plaintiff and said Doan they undertook and agreed to pay to Munroe such sums only as should thereafter become due to Doan for work performed by him for the defendants, but that said Doan failed and refused to carry out his contract with the defendants, and abandoned the work, and that because of such no sum was due Doan, and therefore there was no liability from them to the plaintiff. There was a trial to a jury, resulting in a verdict in favor of the plaintiff, and the defendants appeal.

II. As will be gathered from the foregoing statement of the claims of the parties the theory upon which the appellee rested his case was that he had made an absolute sale of the

1. SALES : liability team to Mundy & Scott, to be delivered to
for purchase Doan, for use in the employment by Doan
price : evi-
dence. under his contract with Mundy & Scott. The

theory upon which appellants relied was that the sale was not made to them nor for their benefit, but for the sole benefit of Doan, and that the statute of frauds had application as to much of the testimony offered and introduced, inasmuch as appellee relied upon an oral contract. We are not required to set out the evidence in great detail that a proper understanding may be had as to the errors urged. The record shows the employment of Doan by Mundy & Scott, to break some of their land in another county; that he needed a team to properly carry on the work, and that Mundy approached the appellee, and said, "If you will sell this team of horses to Mr. Doan, I will see that you get your money for it inside of sixty days." To this the appellee claims to have replied, and in this he is corroborated, that he would not sell Doan the team, but that he would sell it to Mundy, and that agreement was finally reached upon that basis; that Mundy & Scott desired him to accept an order given by Doan to the appellee for \$195 to be paid \$75 in thirty days when fifty acres were broken, and the balance when the work was finished, which was to be not later than June 15th. Such an order was given and received by the appellee; but he testified that

he at first refused it, and again, and that he only accepted it at the request of Mundy, who stated that he wanted it as a protection between him and Doan, and that it would make no difference in the deal between Munroe and Mundy & Scott. The appellants denied that Munroe refused to take the order, and claimed in the evidence that Doan accepted it as the plan of payment. The evidence was in dispute as to the nature of the contract, and the extent of the liability of the appellants under it, and required the submission of the case to the jury, and this was done over appellants' motion for a directed verdict, which was overruled. The points upon which the motion was based are particularly raised in the several assignments of error.

III. Error is first claimed in permitting the appellee to state in his testimony, in response to a question, that "I know him (Doan) to be a man who did not ordinarily meet his obligations," etc. That this was competent as bearing upon the reason why the appellee refused to sell the team to Doan, and would only deal direct with Mundy & Scott we think is clear.

IV. The appellee moved to strike from the record the testimony of Munroe, the appellant, as to the alleged sale of the team, for the reason that no part of the consideration was paid, and there was no delivery of the team to the defendants. This objection is based upon the first division of Code, section 4625, being the statute of frauds. It, of course, will not be claimed that if Mundy & Scott purchased the team for themselves, and that delivery was not made to them until several days after the contract was entered into, proof of the contract, to sustain a recovery against them, must be in writing. It is only when no part of the purchase money has been paid, and no part of the property is delivered, that the rule has application. And when the delivery is made to a third person, under the direction of the purchaser that such shall be done, that is sufficient to take the case from under the rule of the statute.

2. SAME: evidence.

3. SAME: statute of frauds: oral evidence.

Leggett v. Collier, 89 Iowa, 144; *Starr v. Stevenson*, 91 Iowa, 684. There was no error in refusing to strike the evidence.

V. The motion to strike the evidence of Munroe was also based upon the claim that it was of a guaranty of the payment of the amount due from Doan, and therefore within the rule of subdivision 3 of the statute of frauds requiring such to be in writing. The refusal to strike the evidence from the record on this ground is assigned as error. We have referred to the claim of the appellee that he relied upon a sale direct to Mundy & Scott, with a refusal to sell to Doan, and that it had support in the evidence. Assuming, as the strongest view which may be taken of appellants' claim, that the promise was to pay the debt of Doan, yet it would come within the rule that where a promise is based on a new consideration between the parties, giving to the promisor a benefit which he did not enjoy before, it is then regarded as an original undertaking and need not be in writing. *Carraher v. Allen*, 112 Iowa, 171; *Pratt v. Fishwild*, 121 Iowa, 648. But we need not go so far in this case; for if the claim of appellee be correct, it was a purchase by the appellants and not a guaranty of substitution of liability by them; and, being such, proof by parol was competent to establish it. The questions here considered are determinative of other rulings made upon the introduction of the evidence, and also the criticised statement of the trial court, made in the presence of the jury, as to the claim that the contract sought to be proven involves the delivery of the horses to the defendants by delivery to their agent, Doan. This was a fair construction of the claim of the appellee as made in his petition, and is not subject to the criticism lodged against it.

VI. Instruction No. 5, given to the jury, stated that: "The only question in controversy for you to determine in this case is, Did the plaintiff sell the team to the defendant.

There is no other question in controversy in the case." The same instruction stated that the suit was not upon a guaranty of the debt of Doan by Mundy & Scott, and that all the evidence should

4. STATUTE OF
FRAUDS.

5. SALES: evi-
dence: instruc-
tion.

be considered in determining "whether the defendants purchased the team of plaintiff. If they did, your verdict should be for the plaintiff; but if they did not purchase said team, but Doan purchased it, then your verdict should be for the defendants." This instruction is criticised as narrowing the issue, and excluding from proper consideration the claim of the appellants that they only guaranteed payment. As a whole, we think it not subject to the objection made against it. Appellee's right of recovery depended wholly upon proof of a sale by him to the appellants. A sale to Doan, if proven, would defeat his action; and proof of a guaranty, as claimed by appellants, was of but one feature in the proof necessary to show a sale to Doan, evidence of some weight, it is true, but under the facts, not controlling. The appellant requested no instruction upon the question of the guaranty. That given by the trial court correctly stated the law, omitting no necessary statement, and was not erroneous.

We discover no error, and the judgment of the lower court is—*Affirmed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concurring.

KATE MORAN, Appellee, v. MARTIN MARTINSON, Appellant.

Assault and battery: EVIDENCE. In this action for damages for assault
1 and battery the evidence is held to present a case for the jury.

Same. A witness who visited plaintiff the day following an alleged
2 assault and battery was competent to testify that she said she was
not feeling well; as there was nothing in the statement tending to
give a reason for her condition, or to explain the alleged assault.

Same: SELF-DEFENSE: INSTRUCTION. When one has been assaulted
3 he may use such force in repelling the attack as then appears rea-
sonably necessary to protect himself from imminent injury; the
instruction in the instant case restricting defendant to the use of

necessary force, rather than such as appeared to be reasonably necessary, was erroneous.

Same. The right of self-defense arises when one has been assaulted;
4 and when such defense is in the case the court should properly instruct thereon, even though no request was made, a failure to do which constitutes error.

Same: CONFLICTING INSTRUCTIONS. Where the court instructed that
5 the burden was on plaintiff to show that she was assaulted when upon the public highway and in the peace of the state, the further instruction that the undisputed evidence showed that plaintiff was trespassing upon defendant's premises, and illegally carrying a revolver on the Sabbath, and which permitted recovery without proof of the facts required in the former instruction, was conflicting and erroneous.

Appeal from Jones District Court.—HON. MILO P. SMITH,
Judge.

TUESDAY, APRIL 14, 1914.

ACTION for damages resulting from an assault and battery. From a verdict and judgment for plaintiff, the defendant appeals.—*Reversed.*

C. J. Cash, for appellant.

J. J. Locher and *J. S. Welch*, for appellee.

WITHROW, J.—I. The plaintiff is an unmarried woman between forty and fifty years of age, and, as appears from the evidence, of resolute purpose. In her petition she claims that on or about August 4, 1912, as she was passing peaceably along a public highway, driving her cattle to water, the defendant maliciously and wantonly assaulted her, first applying to her vile names and epithets, and then, without excuse or provocation, did strike her with a club, tore her clothes, and stole her revolver, resulting in loss of time, expenditures for medicine and attendance, and pain and suffering, for

which, together with the value of the revolver, she claims damages and right of recovery.

The defendant admitted in his answer that he took from plaintiff her loaded revolver when she was trespassing upon his farm; that he requested her to keep off of his farm, when she pointed the loaded revolver at him, and threatened to shoot him; and in taking the revolver from her, he acted in self-defense, and used no more force than was necessary to do so; and that he in no manner injured her, but retained the revolver, and brought it into court to be disposed of as might be directed.

From a verdict and judgment against him, the defendant appeals.

II. The trouble occurred on a Sunday afternoon. The appellee, as she testified, had been directed by her sister, also unmarried, and with whom she resided, to take the cattle to

the river for water. In so doing she traveled part of the way over a public highway, until she reached the land of a Mr. Pierce.

1. **ASSAULT AND BATTERY: evidence.** She then opened a gate and drove the cattle down to the river, and in doing so was upon land at the time owned by the defendant, on which the cattle were permitted to graze. In this situation the appellant discovered the cattle and their driver, and there then followed a war of words between the parties in which there was employed language which markedly disturbed the peace of the Sabbath. It appears that the appellant had on previous times forbidden the appellee to drive or pasture her cattle upon his land; and it also is apparent from the record that this incursion provoked him to wrath, and her to an assertion of privilege that resulted in the trouble and alleged assault upon which this claim is based. She claims that he came towards her with hands clutched, using profane and abusive language; that he put his fist nearly into her eyes; that she had in one hand a revolver, and in the other a cane; that he grabbed the cane from her hand, and that she then started after her cattle, as they were

straying, when he drove the cane into her side and tore her dress; that the blow threw her into a ditch, and he wrested the revolver from her with such force as to tear her hand; that he struck her with his fist upon her attempt to get out of the ditch; that prior to that she had the revolver in her hands, and kept moving back telling him to keep away. She claims that her cattle did not go upon the Martinson land until after the trouble arose between the parties; but the evidence shows and the trial court instructed the jury that she at the time was trespassing upon the premises of the appellant. After the trouble the belligerent parties shook hands, as she says, at his request, and that she did so because she was in fear of him.

The appellant testified that for a period of several years the appellee and her sister had been trespassing upon his land, cutting his fences, and otherwise interfering with his possession, and that he had often forbidden them to do so. On this Sunday he says that when he saw her he said, "Kate, what does this mean," and she told him to go on about his business; that she tried to strike him with the stick or cane, and he knocked it from her hand, and she then produced her revolver and said, "I'll show you," and that he told her to put it away, as it was dangerous. A few words followed, when, as he claims, she pointed the revolver at him and said, "I'll kill you," whereupon he threw her right hand up, which unbalanced her, and she fell into the ditch; that she changed the revolver to her left hand, when he grabbed it and took it; that, after he had possession of the gun, Kate changed her methods, and asked why they could not be friends; that they talked over their differences, and then shook hands, and were apparently as good friends as ever. There is much more of detail but the foregoing, in substance, states the evidence so far as is necessary to determine the questions raised by this appeal.

III. The assignments of error are that the verdict is contrary to the evidence, is contrary to law, and is contrary to

the instructions, that there was error in permitting a witness to testify to declarations of the appellant the day after the injury, and in giving certain instructions. What we have quoted of the evidence is sufficient to show that the case, upon its facts, was one for the jury, and we therefore need give no further attention to that assignment of error.

IV. A witness visited the Moran home the day after the trouble. He was permitted to testify on cross-examination that she said she was not feeling well; but there was nothing

in what she said which tended to give a reason
 2. SAME. for her condition, or in any manner to explain or recite the occurrence of the previous day. The evidence was not incompetent; was not offered, nor could not be construed as being a part of the *res gestæ*, but a mere declaration as to her feelings and condition, which was not improper.

V. The third instruction given to the jury was to the effect that the undisputed testimony showed that plaintiff was a trespasser upon the premises of the defendant, and that, in

carrying a loaded revolver on the Sabbath or
 3. SAME: self- first day of the week, she was violating the
 defense: in- law; that defendant was justified in ordering
 struction.

her to quit his premises, and in distraining her cattle till his damages were paid; and, if she pointed the revolver at him, he was justified, under the law or in self-defense, in disarming her; that he had, in attempting to eject the plaintiff from his premises, or in disarming her, the right to use sufficient force necessary to accomplish that purpose, and, upon her resistance, he might oppose force to force, as a reasonably prudent man in his situation would do; but he would not be justified in striking her or beating her, or in using any more force than was required to wrest the weapon from her.

Instruction No. 4 was based upon the same rule stated in instruction No. 3 as to the facts which would entitle plaintiff to recover, and was, in effect, that the use of excessive force would make the defendant liable. These instructions are criticised for the reason that they limited the defendant to nec-

essary force, and not such force as to him then seemed reasonably necessary; and also that he was limited to the right to use such force only in disarming the appellee. We think the criticism is just. While the instructions in the main were based upon the right of the appellant to disarm Miss Moran as a trespasser carrying a loaded revolver, the third instruction expressly mentioned his right of self-defense, and all that followed applied alike to either condition. The right of self-defense and that he so acted were raised by the answer of the appellant, and there was proof tending to sustain it.

That right arises when one has been assaulted; and he is permitted to use such force and no more as to him then appeared reasonably necessary to protect himself

4. **SAME.** from imminent injury. *State v. Jones*, 89 Iowa, 186; *State v. Weston*, 98 Iowa, 130; *State v. Smith*, 100 Iowa, 1.

Nowhere in the instructions does this thought appear, nor is there any more than casual mention of the claim that the act was committed in self-defense. Having recognized it as being in the case, the trial court should have instructed upon it, even though no request for such instruction was made, and a failure to do so was error. *Overhauser v. Am. Cereal Co.*, 128 Iowa, 580; *Hall v. Manson*, 90 Iowa, 585; *Capital City Brick Co. v. Des Moines*, 136 Iowa, 243.

VI. Instruction No. 2, evidently adopting the statements of the petition, stated that the burden of proof was upon the plaintiff to show that, at the time she claims to have been assaulted, she was "on the public road or highway and in the peace of the state," and that she was assaulted and damaged. Instruction

5. **SAME: conflicting instructions.**

No. 3 told the jury "that the undisputed testimony shows that, at the time the defendant assaulted her, she was trespassing upon his premises, and that, in carrying a loaded revolver on the Sabbath, she was violating the law." It is difficult to reconcile a right of recovery with the requirements stated in instruction No. 2, as instruction No. 3 in express terms stated

to the jury conclusions of fact in direct contradiction of that what was required to be shown under the rule of the previous instruction. If instruction No. 2 was correct, then, under the facts stated by the trial court to be undisputed the verdict was contrary to it, and there was error in giving instructions Nos. 3 and 4, as recovery was by them permitted without the proof of facts required by No. 2.

That contradictory instructions is reversible error, see *Beaver v. Porter*, 129 Iowa, 41; *Loomis v. Des Moines News Co.*, 110 Iowa, 515; *Vanslyck v. Mills*, 34 Iowa, 375.

For the errors pointed out the judgment of the lower court is—*Reversed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

STATE OF IOWA V. B. L. CONKLIN, Appellant.

Criminal law: ADULTERY: COMMENCEMENT OF PROSECUTION. Where
1 the information charging a husband with adultery was signed and sworn to by the wife the prosecution was commenced on her complaint. Evidence held to support a finding that the wife knowingly signed the information in the instant case.

Same: EVIDENCE. Evidence held sufficient to connect defendant with
2 commission of the crime of adultery and to take the issue to the jury.

Appeal from Washington District Court.—HON. HENRY SILWOLD, Judge.

TUESDAY, APRIL 14, 1914.

THE defendant was convicted of having committed adultery and appeals.—*Affirmed*.

P. J. Hanley, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

LADD, C. J.—I. As the information charging defendant with having committed the offense was signed and sworn to by his wife, the prosecution was commenced on her complaint

1. CRIMINAL LAW: adultery: commencement of prosecution. (State v. Dingee, 17 Iowa, 232), if she was aware of what she was doing. She testified that, in signing and swearing to the informa-

tion, she supposed she was executing papers incident to the procurement of a divorce, and was not aware until afterwards that she was prosecuting her husband criminally. The testimony of the county attorney was to the effect that she was fully informed of precisely what she was doing, and this was strongly corroborated by other evidence adduced. The issue was for the jury, which was fully warranted in deciding that the prosecution was commenced on the complaint of defendant's wife. *State v. Athey*, 133 Iowa, 382; *State v. Leek*, 152 Iowa, 12; *State v. Briggs*, 68 Iowa, 416.

II. The court instructed the jury that, according to the testimony of the woman with whom the offense was alleged to have been committed, she was an accomplice, and, this being

2. SAME: evidence. so, to justify conviction there must have been other testimony tending to connect the defendant with the commission of the offense. Section 5489, Code. She testified that she was employed as a domestic in a family in Washington, Iowa, and, when in a park of that city, defendant introduced himself to her and sat with her about half an hour, talking of mutual acquaintances at Keota, where her folks lived and he had a brother; that several days later, while driving a gray horse with buggy about 8 or 8:30 or 9 o'clock in the evening, he invited her to ride with him, which she did, whereupon he drove "south, then east a ways, then came out on East Washington street, and drove out east of town about four miles," and there had intercourse with her, returning about 10 or 10:30 o'clock, after the 9:45 train had passed; that he took her out riding about a week later, and that she met him near the waterworks, when he wanted her to go riding, having his horse near by, and she would not; that after that he

spoke to her on the street but she did not recognize him, and he called her "sorehead." The defendant admitted having talked with her in the park, but denied ever having taken her out riding or having had intercourse. He testified that he talked with her about assisting his wife in the laundry; that he again spoke to her on the same subject near the gasworks, at which time they arranged to meet near the water-works two evenings later, when she would let him know; and that they met as agreed, when she told him that she would think it over, and that she did not talk with him afterwards. He had been convicted of having received stolen property, and had no visible means of support save from earnings of his wife in operating a laundry at her home. The jury, then, might well have concluded that meetings of these parties proven by others and admitted by defendant were for some other purpose than the employment of her to iron for his wife. Though defendant denied having taken her out riding, her testimony that he did so is corroborated by the evidence of four witnesses who were riding along East Washington street between 8 and 9 o'clock in the evening, one of whom identified both defendant and his accomplice; two recognized defendant and were certain the woman riding with him was not his wife; and the fourth thought she did not look like his wife. Both the date and the hour corresponded with those fixed by the alleged accomplice when she rode out with defendant on the evening of the alleged offense, and the witnesses must have passed them when starting out rather than returning. She did not testify to the direction they drove on East Washington street, as is assumed in argument, nor that they passed over that street but once. We are of opinion that this evidence tended to connect defendant with the commission of the offense, and, when considered in connection with other evidence confirming the details of the story of the accomplice, was sufficient to carry the case to the jury. *State v. Thompson*, 87 Iowa, 671; *State v. Müller*, 65 Iowa, 60; *State v. Dorsey*, 154 Iowa, 298.

III. The attorney prosecuting for the state was not guilty of misconduct, and we are not inclined to interfere with the sentence, in response to the contention that imprisonment in the county jail would have been sufficient punishment.

There was no error, and the judgment is—*Affirmed*.

DEEMER, GAYNOR, and WITHROW, JJ., concur.

MERCHANTS' NATIONAL BANK, Appellee, v. R. E. CRESSEY, ET AL., Appellees; C. A. ROSEMOND, Appellee; FRANK S. SKINNER, Appellant.

Suretyship: EXTENT OF LIABILITY: CONTRACT: CONSTRUCTION. The

1 law favors sureties and a contract imposing obligations upon them will be strictly construed so as to impose only the burdens within its terms; it will not be extended either by implication or construction. Thus a contract of the stockholders of a corporation to repay a bank all moneys advanced or loaned the corporation on and after that date, including renewals thereof, will not render the sureties liable for pre-existing indebtedness.

Same. Under an agreement of sureties to repay money advanced or

2 loaned another after the date of the agreement, a renewal note given for an existing indebtedness was not within the agreement; as it amounted simply to a change in the evidence of an old debt, and was not an advance or loan on and after the date of the contract, and the sureties were not liable therefore.

Same: CONTRACT OF GUARANTY: FRAUD: EFFECT. The fact that a

3 surety was induced by false representations to sign an agreement of guaranty, which was delivered and acted upon by the other party without knowledge of such representations, would not relieve the surety of liability for obligations falling within the terms of guaranty.

Same: DISCHARGE OF GUARANTOR: RENEWAL OF INDEBTEDNESS. Where

4 a contract of guaranty including renewals provided that it should be effective until after thirty days written notice to the contrary was given, by giving the notice a guarantor was not relieved from liability for indebtedness existing at the time of the notice, but only from that subsequently arising; and a creditor accepting a

renewal of existing indebtedness after such notice elected to be bound by the notice, and will be presumed to have relied upon the security existing at the time of the renewal.

Same: BURDEN OF PROOF. In a suit upon a contract of guaranty to
5 repay money advanced or loaned, including renewal after that date, and until notice to the contrary, the burden is upon the creditor to prove that the indebtedness sued upon was for loans or renewals after execution of the contract.

Appeal from Cedar Rapids Superior Court.—HON. C. B. ROB-
BINS, Judge.

TUESDAY, APRIL 14, 1914.

APPEAL by Frank S. Skinner from a judgment holding him liable on a contract of guaranty; and appeal by the Merchants' National Bank of Cedar Rapids, from a judgment finding C. A. Rosemond not liable, as guarantor.—*Affirmed* in part, and *Reversed* in part.

Barnes & Chamberlain, for plaintiff.

F. L. Anderson, for defendant Skinner.

Powell & Randall, for defendant Rosemond.

WITHROW, J.—I. This action was brought against appellant, Frank Skinner, and six others upon a written contract of guaranty to recover a balance of indebtedness merged in judgment in favor of the Merchants' National Bank of Cedar Rapids against the Cedar Rapids Cereal Company. Four of the defendants made default, and judgment was entered against them. Defendants Skinner, this appellant, and Rosemond each made defense. Upon the trial a verdict was directed by the court against Skinner, from which he appeals, and in favor of Rosemond, from which the bank appeals.

The action is based upon a contract of guaranty, which is as follows:

Whereas, the undersigned are stockholders in the Cedar Rapids Cereal Company, a corporation organized under the laws of the state of Iowa, with its principal place of business in the city of Cedar Rapids, Iowa, and, therefore, interested in the business of said company, and its securing by loans from time to time from the Merchants' National Bank of Cedar Rapids, Iowa, the sums of money sufficient to enable the company to properly conduct its business. Now, therefore, in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and in further consideration of the advancement of money and the giving and extending of credit by the Merchants' National Bank of Cedar Rapids, Iowa, and for other valuable considerations, we, the undersigned, promise to the Merchants' National Bank of Cedar Rapids, Iowa, on demand, all the money advanced and loaned the said Cedar Rapids Cereal Company on and after this date, including any renewals thereof, without notice to us, whether in full or in part, the total amount of said loans not to exceed eleven thousand five hundred dollars (\$11,500.00) in the aggregate, together with interest on said loans and advances from the date named are made and received at the rate of six per cent. (6 per cent.) per annum until paid. This guaranty to be effective until thirty (30) days written notice to the contrary is given the Merchants' National Bank by the undersigned. Dated at Cedar Rapids, Iowa, this 6th day of January, 1911. Jno. E. Gable. C. A. Rosemond. R. E. Cressey. C. H. Kurtz. J. W. Zook. J. W. La Grange. Frank S. Skinner.

The answer of Skinner, the appellant, raised the issue of fact that his name was procured to said instrument by one Kurtz by fraudulent representations as to the value of the property of the principal debtor, the cereal company; and also that it was agreed between appellant and Kurtz, who procured his signature, that the instrument would not be delivered to the bank until signed by all of the stockholders of the Cedar Rapids Cereal Company.

As a question of law raised by the pleadings, it was urged that the instrument of guaranty sued upon provided only for

the amount advanced and loaned by the bank from and after the date of said instrument, and that there was no new money actually advanced and loaned after said date.

Upon the trial the following concession of facts was made :

It is agreed and stipulated by and between the parties that the Cedar Rapids Cereal Company, on October 2, 1911, made and executed its promissory note to the Merchants' National Bank of Cedar Rapids, Iowa, in the sum of \$11,500, payable October 15, 1911, with 6 per cent. interest per annum after maturity ; that said note was given in renewal of another note previously executed, which said note was given in renewal of several other notes previously executed, aggregating the total amount of the first note above mentioned ; that said note first mentioned was placed in judgment against the Cedar Rapids Cereal Company in the superior court of the city of Cedar Rapids, Iowa, upon the 8th day of July, 1912 ; that an execution was issued upon said judgment, and all the property and assets of the Cedar Rapids Cereal Company were levied upon and sold under said execution at public sale by the marshal of the city of Cedar Rapids, and there was realized therefrom and applied upon said judgment the sum of \$7,365.32, leaving a balance of principal and interest upon said judgment due and unpaid ; that upon the 15th day of December, 1909, the Cedar Rapids Cereal Company owed the Merchants' National Bank the sum of \$11,500, and no additional moneys were ever advanced by the said bank to the said cereal company after said time, the indebtedness having been carried by the said bank upon new notes representing the same, taken from the bank from time to time, in payment and surrender of the old note, and upon the payment of the interest on the same ; and it is agreed that the amount still due upon said judgment is the sum of \$4,670.92, with interest from the 17th day of August, 1912, at 8 per cent. per annum.

It also was conceded that the officers of the Merchants' National Bank had no knowledge of any statements or representations made by Kurtz to the appellant, Skinner.

II. We consider first, on Skinner's appeal, the question of law presented by the record, and his claim that his liability under the instrument of guaranty was only for indebtedness

contracted after its execution; and that it appears without dispute that the indebtedness for which was given the note which was finally merged in the judgment existed at and prior to the time he signed the instrument, and for such he is not liable.

The relation of the appellant to the claim in suit is that of surety only, and the rights of the parties must depend upon a construction of the agreement, governed by the general

1. SURETYSHIP:
extent of liability:
contract: construction.

and just rule that sureties are favored in the law, and a contract creating obligations against them must be strictly construed, so as to impose only the burdens within its terms, and should not by implication or construction be extended. Brandt on Suretyship, section 79; *Crapo v. Brown*, 40 Iowa, 490; *Ida County Bank v. Seidensticker*, 128 Iowa, 54.

The language of the agreement which recites the limits of liability is: "We promise to the Merchants' National Bank of Cedar Rapids, Iowa, on demand, all the money advanced and loaned the Cedar Rapids Cereal Company on and after this date, including any renewals thereof," etc. It would require a forced construction, not within the plain meaning of the language used, to hold that the contract created liability for pre-existing indebtedness. The use of the words "on and after this date" is a definite limitation, not extended or enlarged by the subsequent provision "including any renewals thereof," as such could apply only to that which immediately preceded it. It is a recognized rule that an instrument creating a liability as surety, which did not in terms make it applicable to a pre-existing indebtedness, could not be made the basis of a recovery for such indebtedness, but that it related only to that created from and after the time of its execution. 32 Cyc. 74; *Bartlett v. Wheeler*, 195 Ill. 445 (63 N. E. 169); *United States v. Boyd*, 15 Pet. 187 (10 L. Ed. 706); *United States Fidelity Co. v. Fultz*, 76 Ark. 410 (89 S. W. 93).

It follows that the liability of the appellant can only be for money loaned and advanced after the date of the execution

of the contract of guaranty or suretyship; and with this conclusion we inquire into that which appellant urges brings the case within that rule.

III. Fairly stated, the claim of the appellant is that, while it is conceded that at and prior to the time of the execution of the contract of suretyship there was an indebtedness

of the cereal company amounting to \$11,500,
2. SAME. evidenced by several notes, and while the note upon which the judgment was based was given in renewal of a note previously executed, which was in renewal of the former indebtedness, the note for \$11,500, dated October 2, 1911, being after the execution of the surety contract, was in fact given in payment of and for the surrender of the former note, the interest on it being at such time paid, and that by reason of such facts a new debt was created. Supporting this claim of the appellant, quotation is made from 7 Cyc. 877, to the effect that, "if a new note is taken in payment of an original note, the original debt is extinguished and a new debt created," and as cases which it is claimed uphold that rule are cited, *Smith v. Bynum*, 92 N. C. 108; *Merriman v. Social Mfg. Co.*, 12 R. I. 173. The case first cited arose out of certain rights claimed against personal property, alleged to be covered by a chattel mortgage. All that was held in that case was that, where indebtedness secured by a chattel mortgage which after its maturity was settled by giving a new note and mortgage upon the same property, a purchaser of the mortgaged property from the mortgagor prior to the execution of the second mortgage took it free from that incumbrance. In the *Merri-*
man case it appeared that certain notes secured by an accommodation indorsement were held by a bank. At their maturity other notes for the same amount, and with the same indorsements, were offered for discount and accepted. The proceeds of the discount were placed to the credit of the makers, who then drew their checks and paid the former notes, which were returned and stamped "paid." The controversy in that case was as to the liability of the indorsers; their obligation under

a separate contract being to pay "all the indebtedness now due or to grow due," and was made to turn upon the fact that the transaction was not a mere exchange of new notes for the old ones, which the court held was not evidence of absolute payment, but upon the fact that the new notes were given to create new credits, which were in turn used, by check, to pay the old notes. The case does not sustain the rule, as broadly claimed by the appellee.

It is true that, when a note is given in satisfaction of earlier paper, such paper is thereby discharged. This means at most that the right of action upon the original evidence of indebtedness is lost, having been merged in the new note, which alone, after such transaction, stands as the true evidence of indebtedness.

Quite in point with the present case is that of *Glyn v. Hertel*, 8 Taunton Rep. 208 (Eng.), in which it was held that a guaranty upon which suit was brought only contemplated future loans, and that, when prior notes were taken up and new notes given in their stead, such did not amount to a loan of money so as to charge the defendant.

Many cases may be found in the books bearing upon the question of the liability of a surety upon original notes which are subsequently renewed and the indebtedness evidenced by new paper, but they afford no satisfactory solution of the present question. Nowhere do we find authority for the conclusion that such a transaction is more than a change in the evidence of indebtedness at times releasing sureties when it appears that the original note is canceled and taken up, and in other instances holding them yet liable when there was no surrender of the original note and the new one was taken under such circumstances as to indicate an intention that it should not be canceled.

Recurring again to the instrument upon which this suit is based, its obligation was to pay all money advanced and the renewals thereof. The transaction resulting in the \$11,500 note was in effect but a renewal of prior indebtedness, and

there is in the record nothing to indicate a contrary intent. It was in no sense an original borrowing of money, a creation of indebtedness such as was contemplated by the contract, but was only a change in form of that which spoke for the old debt. We think the trial court erred in directing a verdict against the appellant, Skinner.

IV. As to the claim of fraud urged by the appellant, and also the alleged agreement that the contract of guaranty should not be delivered until it had been signed by others who did

not sign it, the foregoing conclusions render their consideration unnecessary. But it may properly be said that the bank officials had no

3. SAME: contract
of guaranty:
fraud: effect.

knowledge of any fraud or agreement, if there were such. The appellant joined in the execution of what appeared to be a valid obligation of suretyship, carrying on its face no evidence of infirmity, and delivered it to a third party, an officer of the cereal company, and it was, as the record shows, used as a basis for the renewal of the old loan. Under such facts he has not the right to be relieved of any liability thus permitted to be created. *Savings Bank v. Boddicker*, 105 Iowa, 554.

V. We turn to the appeal of the bank from the action of the trial court in directing a verdict in favor of defendant Rosemond. His only claim was that, under the last clause of the

guaranty, he had the right to be relieved from its obligations on thirty days' notice to the bank, and that he had so elected. He claims,

4. SAME: dis-
charge of guar-
antor: renewal
of indebtedness.

and in this is supported by the evidence, that on July 29, 1911, and on August 21, 1911, he gave written notice to the Merchants' National Bank that he no longer was connected with the cereal company, and that he demanded release as one of the guarantors; both letters being more than thirty days prior to the execution of the note upon which the judgment was based. The clause upon which he relies is: "This guaranty to be effective until thirty days' notice to the contrary is given the Merchants' National Bank."

This action is brought upon the instrument of guaranty.

If Rosemond, by reason of prior agreements, was liable as surety for the indebtedness evidenced by the \$11,500 note, such does not appear in the record; and his case, therefore, must be treated as resting solely upon the contract of guaranty, and his rights thereunder. His answer filed in the case did not raise the questions considered and decided in the Skinner appeal, but only his right to be discharged because of having given notice as provided by the contract. His motion to direct a verdict, while urging, among other things, nonliability because of the fact that no new loans were made after the execution of the guaranty, was sustained upon the single ground of his having given notice of his intention to withdraw as guarantor, and that the note upon which the judgment was based was a different and subsequent obligation to that upon which he was bound at the time he gave notice of his intention to withdraw as guarantor.

We think that a fair construction of the instrument of guaranty is that there was reserved to the respective parties the right upon the performance of certain named conditions to relieve themselves from such liability as might thereafter arise. What the effect would be on the rights of co-guarantors does not arise as a question under this record. Notice of intention to withdraw could not operate as a discharge from liability existing at the time of the notice. 14 Am. & Eng. Enc. (2d Ed.) 1160. But it appears from the evidence that with such notice the appellant bank thereafter took a renewal of the previous indebtedness. It is urged that as the guaranty provided liability for money loaned on and after its execution, including any renewals thereof, by its express terms the renewal note executed subsequent to his notice of withdrawal came within its express provisions. We cannot so construe it, but rather that he would be liable for money advanced and renewals thereof during the time in which by its terms he would be held, which was the time until he should by proper notice indicate his purpose to be no longer held. It cannot be said that this in any way lessened the rights of

the bank in its enforcement of the obligation against him, for with notice of his withdrawal it could yet rely upon the existing evidence of indebtedness made before such notice. In accepting the renewal after such notice it thereby elected to be bound by his notice of withdrawal, and is presumed to have relied upon the security existing at the time of the renewal.

It should also be remembered that, to establish liability in any event, the burden of proof was upon the plaintiff to show, as against the guarantor, the loan of money or renewals of the same from and after the execution of the instrument upon which this suit is based and before notice of revocation. As found in the previous division of this opinion, such has not been shown.

It follows that, as to the appeal of the Merchants' National Bank, the judgment of the trial court is—*Affirmed*; and as to the appeal of Skinner the judgment is—*Reversed*.

LADD, C. J., and DEEMER and GAYNOR, JJ., concur.

ELSIE PHILPOTT and LEILA BROWNFELD, Contestants and Appellees, v. W. M. JONES, ET AL., Proponents and Appellants.

Wills: TESTAMENTARY CAPACITY: PRESUMPTION: BURDEN OF PROOF.

- 1 Where a will has been formally executed and attested as required by law, the presumption arises that the testator had sufficient mental capacity, and the burden is upon the contestants to establish his want of capacity.

Same: TRIAL DE NOVO. A will contest is not triable *de novo* on appeal,

- 2 but the verdict of the jury when supported by evidence sustaining their finding is conclusive.

Same: TESTAMENTARY CAPACITY: EVIDENCE. Mere age, feebleness or

- 3 failing memory of testator, or exclusion from his bounty of some or all of his legal heirs, or inability to make contracts or engage in intricate business matters, will not be sufficient to defeat a will on

the ground of mental incapacity, if the testator retains sufficient mentality to comprehend the objects of his bounty, the nature and extent of his estate and the disposition he wishes to make of it. However, incapacity to make a will may exist though to outward appearances a testator may seem to non-experts with whom he may come in casual contact to be competent. Evidence held to sustain a finding of incapacity.

Same: EVIDENCE: PECUNIARY CONDITION OF CONTESTANT. The con-
4 testant of a will may show his pecuniary condition, where it appears that such condition was known to the testator at the time of making the will.

Evidence: HYPOTHETICAL QUESTIONS. It is necessary that the record
5 contain some evidence of the facts assumed in a hypothetical question, but they need not be established by the testimony; and only the substance of the testimony need be stated in the question. Nor is it necessary that every fact concerning which evidence has been offered be included in the question, where the omitted facts were brought to the attention of the witness and jury by the examination of the witness.

Same: EVIDENCE NOT RESPONSIVE: RIGHT TO OBJECT. Where the answer
6 of a witness is competent, relevant and material to the issue, the objection that it is not responsive to the inquiry can only be raised by the party propounding the question.

Same: MENTAL CAPACITY: OPINION EVIDENCE: FORM OF ANSWER.
7 The answer to a hypothetical question touching the mental capacity of a testator, that he was not a normal individual, was not competent to transact business, and that personally the witness would not take the conclusion or judgment of such an individual as being sound, while not expressed with technical nicety, sufficiently expressed the opinion that testator was not of sound and disposing mind.

Same: INSTRUCTIONS: INVASION OF PROVINCE OF JURY. A requested
8 instruction selecting a portion of the evidence and seeking to give it undue prominence followed by an attempt to minimize its probative force on the theory that standing alone it would not establish the fact sought to be proven, was properly refused. Thus in the contest of a will it would be improper for the court to take up such questions as the unreasonableness of the disposition of the property, the exclusion of legal heirs or members of the family entitled to testator's bounty, or that those entitled to his bounty were in poor financial circumstances, and treat each matter in its probative force as standing alone, although such matters are

entitled to consideration along with the other evidence in determining the testator's mental capacity.

Same. There is no legal presumption that a physician who attended
9 testator and treated his physical infirmities is presumed to know his mental condition better than one trained in the treatment of mental diseases; and the requested instruction in this case calling particular attention to the evidence of the attending physician, and suggesting the thought that he was thus better qualified to speak on the subject, without referring to his qualification or experience was properly refused.

Same: INSTRUCTIONS: CONFORMITY TO EVIDENCE. Where it clearly
10 appeared that testator knew the financial condition of the contestants of his will before the will was made, an instruction that the financial condition of contestants might be taken into consideration, without confining its consideration to such condition as was known to testator, was not erroneous.

Appeal from Des Moines District Court.—HON. W. S. WITH-
ROW, Judge.

TUESDAY, APRIL 14, 1914.

CONTEST over the probating of a will.— *Affirmed.*

Power & Power, for appellants.

Seerley & Clark, for appellees.

GAYNOR, J.—On February 20, 1912, there was filed in the district court of Des Moines county, Iowa, an instrument purporting to be the last will and testament of W. E. Jones. Due notice of probate was given by the clerk of the court by publication, as required by section 3284 of the Code of 1897. No other or further notice was given. On the 15th day of April, 1912, Elsie Philpott and Leila Brownfield, granddaughters of the testator, appeared and filed objections, alleging as a ground therefor that the said W. E. Jones, at the time of the execution of said instrument, was not competent to execute a valid will;

that he lacked testamentary capacity. Upon the issue thus tendered, the cause was tried to the court and a jury. W. M. Jones, W. H. Myers, Mary E. Myers, Sarah Fie, and Ann Featherby appeared in said proceedings, as proponents, but filed no pleadings. The cause having been fully submitted to the jury, the jury returned a verdict for contestants, finding that the instrument offered as the last will and testament of W. E. Jones should not be admitted to probate. The jury further found, in answer to a special interrogatory propounded by the court, that the contestants had proven, by a fair preponderance of the evidence, that, at the date of the execution of said instrument, W. E. Jones was not of sound mind. Thereafter, on the 30th day of November, 1912, proponents filed a motion for a new trial, which was, by the court, overruled. Thereupon the court entered an order refusing the probate of the instrument offered as the last will and testament of W. E. Jones, and proponents appeal.

The main contention of appellants in this case is that the evidence offered and submitted by contestants failed to overcome the presumption created by the due execution of the instrument offered for probate, and failed to establish want of testamentary capacity on the part of the said Jones. Second, that even if contestants' evidence did tend to show want of testamentary capacity, the rebuttal evidence offered by proponents preponderated, and that a preponderance of all the evidence clearly established testamentary capacity, on the part of the testator, at the time the instrument was executed.

It is true that the burden of proof rests upon contestants to show want of testamentary capacity, for the law presumes that a party making a will has, at the time of the making of it, sufficient mental capacity to do so, and one who alleges to the contrary assumes the burden of proving his contention. When an instrument of this character is filed with the clerk for probate, and the formal execution of it is shown, where it is shown to have been duly executed and attested, as required

1. WILLS: testamentary capacity: presumption: burden of proof.

by law, the burden shifts to the contestants. See *Stephenson v. Stephenson*, 62 Iowa, 166; *Hull v. Hull*, 117 Iowa, 744; *Ross v. Ross*, 140 Iowa, 51; *Beebe v. McFaul*, 125 Iowa, 514.

As to whether or not contestants have carried the burden to a successful issue is not a question which we are called upon to determine. This case is not triable *de novo* here. We are bound by the finding of the jury, who are triers of fact, if there is evidence supporting and sustaining their finding upon the ultimate question of testamentary capacity. Where reasonable minds, searching for the truth, might reasonably differ upon the record made as to what the ultimate fact is about which there is controversy, it is, and always must be, a question for the jury. Where the record presents a state of facts from which an ultimate conclusion must be drawn, and reasonable minds might differ as to what conclusion should be drawn from the ultimate facts proven, it then becomes a jury question.

The ultimate fact here to be determined is, Did the testator in this instrument possess a mind that retained full knowledge of the property he possessed, an intelligent perception and understanding of the disposition

3. SAME: testamentary capacity: evidence. he desired to make of it and the persons that he desired to be the recipients of his bounty, with capacity to recollect and comprehend the nature of the claims of those that are excluded from participating in his bounty, a mind capable of exercising judgment, reason, and deliberation, and capable of weighing the consequences of his will to a reasonable degree and the effect of it upon his estate and family, at the time of the execution of the will? It is not necessary that he be competent to make contracts or transact business generally, nor that the mind retain all the vigor and force incident to youth, or that which attends upon robust physical health, in order that he may have this capacity. The mere fact, standing alone, that a person is old, in feeble health, or that his memory does not possess the vigor of youth, or of earlier years, or the fact that he has excluded from his bounty

some or all of his legal heirs, or that his mind has reached that uncertain stage that would render him incapable of making a contract, or engaging in complex or intricate business matters, will not, in and of themselves, defeat a will executed by him if, notwithstanding this, he retains sufficient mind to comprehend the natural objects of his bounty, the nature and extent of his estate, and the disposition he wishes to make of it, with the full appreciation of those whom he desires to be the recipients of his bounty. See *Perkins v. Perkins*, 116 Iowa, 253; *In re Evans' Estate*, 114 Iowa, 240; *In re Allison's Estate*, 105 Iowa, 130; *Webber v. Sullivan*, 58 Iowa, 260; *Meeker v. Meeker*, 74 Iowa, 352.

In Re Estate of Allison, supra, this court said, in a case involving testamentary capacity: "The conclusion depends much on the credit to be given to particular witnesses, not so much with reference to their veracity as with reference to their conclusions from observations and particular facts coming to their knowledge. The line between competency, and incompetency, or that shows a testamentary capacity, is always traced with uncertainty, and the findings in most cases are justified only as the best solution of a doubtful problem. . . . However the facts might be found, there would be the conviction that it was doubtful. It is not to be properly said that the evidence is conclusive either way. With such conditions the finding of the jury should stand, and especially after the district court has declined to interfere."

The condition of the human mind at any stage of human existence is difficult of proof; perhaps the most difficult of any with which courts and juries are compelled to deal. Mental unsoundness, whether resulting from old age or physical sickness, is so various in its character and so different in its manifestations that it is often difficult for the most experienced experts, after most careful and thorough investigation, to trace it to any sufficient cause, or define its extent or its effect upon the conduct of the individual. Even the most experienced alienists, with all the facts before them, touching the conduct

of the individual concerning whose mental condition the investigation is instituted, are often found widely differing in their conclusions as to the then condition of the mind under consideration. It has been said that the fact that the testator transacted his own business, and to all outward appearances seemed to be of sane and sound mind to those with whom he came in contact in business or in a social way, while competent to be considered on the question of sanity, does not, of itself, conclusively establish sanity. Mental unsoundness may exist which would render a man incompetent to make a will, notwithstanding to all outward appearances he seems to be sane to those with whom he comes in casual contact, who are not experts upon the question.

We have examined this record with care for the purpose only of ascertaining whether or not in the record there is sufficient evidence upon which a jury might reasonably predicate a conclusion that this testator, at the time of the execution of the will, did not have that testamentary capacity which, under the rules generally adopted, was sufficient to enable him to make a binding will. It is difficult to lay down any rule sufficiently broad in its application and sufficiently comprehensive in its scope that it may serve as a certain guide in determining whether or not, in a particular instance, the testator had, or had not testamentary capacity, but, from the facts, as we gather them from a careful reading of this record, studied in the light of the rules laid down for guidance in matters of this kind, we can only reach the conclusion that the record presents a state of facts from which reasonable minds might reach different conclusions. We do, however, find that there is sufficient evidence to justify the jury in its finding as to the ultimate fact.

Proponents, however, contend that the court erred in the submission of the cause to the jury, to proponents' prejudice; that prejudicial errors were committed by the court in the trial and submission of the cause that entitled proponents to a retrial. We may not dispose of the errors complained of in

the order of their assignment, but will endeavor to dispose of each in what appears to us to be the logical order of sequence.

It appears that the court allowed the contestants to show their pecuniary condition at the time of the execution of the will. It appears that this testimony was admitted, subject to a showing that at the date of the execution of the will the decedent had knowledge of such condition, and it is complained that no testimony was offered from which the jury could find that the testator had such knowledge at that time, and that there was error in the admission of this testimony in the absence of such showing. Without stopping to analyze this testimony, we have to say that under the rule laid down in *Cash v. Dennis*, 159 Iowa, 18, citing *Mileham v. Montagne*, 148 Iowa, 476, this testimony was admissible, if the fact was within the knowledge of the testator at the time of the making of the will. In *Cash v. Dennis*, it is said: "The law seems to be well settled that the jury, in determining the ultimate question submitted in a case like this, has a right to consider any evidence showing that the will was just or unjust, reasonable or unreasonable, natural or unnatural, the natural object of testator's bounty, the financial condition of the different members of his family at the time of the execution of the will, the extent of the estate of the testator, and apparent equality or inequality in the provisions of the will, although no one of these matters, standing alone, would justify a jury in finding want of mental capacity."

An examination of this record shows that the pecuniary condition of these contestants was brought to the knowledge of the testator before the time of the execution of the will. This is shown by the testimony of the mother of contestants, as well as by the testimony of the contestants themselves.

It is next contended that there was error in the action of the court in refusing to strike from the record the answers

4. SAME: evidence: pecuniary condition of contestant.

of Dr. Applegate who was called as an expert medical witness, and to whom hypothetical questions were propounded. It is said that the questions propounded contained facts of which there was no proof. An examination of these questions fails to disclose the error of which proponents complain. It is not necessary that the facts be established by the testimony in order to justify an assumption of their existence for the purpose of a hypothetical question, but it is necessary that there be some evidence in the record of the existence of the facts.

It is not necessary that every fact, concerning which testimony has been offered, be included in a hypothetical question, but only such facts, concerning which evidence is offered, as bear upon the mental condition of the testator at the time of the making of the will. It is not necessary that the testimony of a witness touching any particular fact, as it appears in both direct and cross-examination, be included in a hypothetical question to make it proper, but that the substance of his testimony, that which it tended to show, need only be stated.

The complaint here seems to be that counsel for contestants, in propounding the hypothetical question to Dr. Applegate, omitted some matters, shown, by the testimony of a witness, upon which the hypothetical question was predicated, and that this omission destroyed the question as a basis for the final judgment as to the capacity of the testator. If the contention of counsel were to be adopted as the correct rule in propounding hypothetical questions, it would tend to confuse, rather than enlighten the jury as to the facts upon which the question was predicated. But, however this may be, we are satisfied that if anything was omitted from the hypothetical question, the omitted portions were fully brought to the attention of the witness and jury on cross-examination, and the further examination discloses that the omitted portions were all unimportant matters.

We find no prejudicial error in this respect.

It is next contended that the court erred in overruling proponents' motion to strike the answer of Dr. Applegate to the hypothetical question propounded to him, because the

answer was incompetent and not responsive,
 6. SAME: evidence not responsive: right to object. the answer being substantially as follows:

"Mr. Jones was not a normal individual by any means, and not competent to transact business, in that, personally, I would not take the conclusion, or opinion, or judgment of such an individual as being sound." The objection urged at the time was that the answer was not responsive and incompetent, and based on the influence and impression the facts stated in the hypothetical question would have on Dr. Applegate personally, and is not an expression of the opinion of the witness as to the mental condition of the decedent. In urging this objection, reliance is had upon what was said by this court *In Re Will of Stufflebeam*, 135 Iowa, 341, but a reading of this case discloses that the question of the competency or relevancy of the testimony was not urged. What was said there related, not to its competency and relevancy, but to its probative force, which presents an entirely different question. The fact that this answer was not responsive to the question cannot be taken advantage of by any one but the party propounding the question. If the answer is competent, relevant, and material to the issue, and the party propounding the question does not object to the answer, on the ground that it is not responsive to his question, his opponent cannot do so for him.

The one objection that can be considered that was at the time urged by proponents is that the answer is incompetent because it states what he would do, personally, in regard

to conditions such as are stated in the hypothetical question. The objection went to the
 7. SAME: mental capacity: opinion evidence: form of answer. whole answer, and not to the portions now complained of. In the answer given by the witness, he stated, in substance, that it was his opinion, based on the facts stated in the hypothetical question, that testator was not a normal

individual, and by reason of his condition not competent to transact business. The witness stated, in substance: "If all the statements that you have incorporated in the questions are facts, . . . I am of the opinion that he wasn't a normal individual by any means, and not competent to transact business." The further statement that he would not take the conclusion, or opinion, or judgment of such an individual as being sound, or that such an individual, as was described in the hypothetical question, was, because of unsoundness of mind, incapable, in the opinion of the witness, of reaching a sound conclusion, or forming a sound opinion or judgment, does nothing more, so far as it reaches in its probative force, than disclose the opinion of the witness upon the facts stated that the testator was not of sound mind at the time of the execution of the will. Words are intended to convey ideas. To convey to one mind the thoughts of the other mind. It is the idea conveyed, through the instrumentality of speech, that is moving and controlling, and has probative force as an expression of opinion, and the answer of the doctor in this case, though not worded with the technical nicety which commands approval, was sufficiently distinct and definite to convey to the mind of the jury the thought, sought to be elicited through his testimony, that the testator was not, at the time of the execution of the instrument, of sound and disposing mind. We think no prejudicial error exists in the ruling of the court on this matter.

It is next contended that the court erred in refusing to give to the jury certain instructions asked by proponents, known in the record as Nos. 10 and 12. These instructions

8. SAME: Instructions: invasion of province of jury. are objectionable, and were rightly refused because they attempt to separate certain portions of the contestants' evidence which, if

accepted by the jury as true, would tend to show mental incapacity, and seek to give to such portions so separated undue prominence in the consideration of the jury, followed by an attempt to minimize or negative their probative force,

on the theory that, standing alone, they would not establish the ultimate conclusion sought to be established by all the testimony. It is not claimed, and could not be well claimed, that any of the matters referred to, in and of themselves, would establish want of testamentary capacity. The evidence, as a whole, should be considered by the jury in determining the ultimate question, and it is not proper, in any case, for the court to select some portions of the testimony which, in and of itself, may have some probative force, and then attempt, by instructions, to minimize this testimony to the point of its probative force when standing alone. Thus that the disposition of the property was unreasonable; that the testator was very old; that he excluded some of his legal heirs from his bounty; that some of the members of his family, who should be the natural objects of his bounty, and who were excluded, were in poor financial circumstances. Each of these matters may be considered by the jury, and they may be so told, but it is not proper for the court to take up each question by itself and treat it, in its probative force, as if standing alone. Thus, in instruction No. 10, the court was asked to say to the jury:

Testimony has been introduced, and has not been contradicted, that in discussing the provisions of the will, the making of which was contemplated by W. E. Jones, he stated that it was not worth while for him to give the contestants a considerable share of his estate because they were extravagant and would waste it. Testimony has also been introduced, and has not been contradicted, that he felt aggrieved over the apparent neglect that he had received from the contestants. In determining whether the provisions of the will are so unreasonable as to create a presumption that W. E. Jones was of unsound mind, it is not necessary that the facts were as he supposed at the time of the execution of the will, and if you find from the evidence that W. E. Jones was influenced in the provision that he made for the contestants, by the opinion that any part of his estate he gave to them would be wasted, or if he felt aggrieved because of the apparent neglect, and for that reason made such provision, that would not show mental unsoundness, even if such opinions were unjustified,

and the facts were not as he supposed them to be. W. E. Jones owned the property disposed of and had the right to make such disposition of it as he saw fit.

This instruction, we think, invaded the province of the jury, and seeks to limit the probative force of such testimony unreasonably. If the facts set out in the instruction, claimed to have been proven without contradiction, were as stated, but were not in fact true, and Jones had no reasonable ground for believing them to be true, the jury might well have considered such opinions entertained by him as substantial evidence of the existence of the very fact contended for by contestants.

In instruction 12, asked by the proponents, the court was asked to say to the jury: "The attending physician is presumed to know the state of the mind of his patient, and these
9. SAME. are facts that should be considered by the jury in determining the weight that should be given to their testimony." It appears in this case that physicians were called who had attended the deceased during the years of his sickness; that they were called as witnesses to testify on behalf of proponents. There were other doctors called, as experts, who had not attended him during his sickness, and the purpose of this testimony was to emphasize and give prominence and greater probative force to the testimony of the doctors who attended him than to the others who had not attended him, but who testified for contestants, and this without reference to prior training or experience in matters of this kind. There is no presumption that a physician who is called to attend upon a sick man, to treat him for his physical ailments, is better qualified to testify, as to the mental condition of the patient, from the mere fact of attendance upon his physical sickness, than is one who is trained to the treatment, and who has large experience in the treatment, of mental diseases. We think here, too, counsel sought to have the court invade the province of the jury. The weight to be given to

the testimony of a witness depends upon too many things to justify the court in limiting its probative force to one particular fact.

In proponents' complaint of the court's refusal to give instruction No. 10, they rely upon *Mallow v. Walker*, 115 Iowa, 242, in which the court said: "Walker seems to have had sufficient mind to determine for himself what he wanted to do, and to carry out his purpose with reference to the disposition of what property remained to him, and it is not for us to pass upon the unreasonableness of such disposition. His antipathy to Mallow, which seems to have been suddenly formed, may have been justified; and, even if unjustified, would not show mental incapacity."

It is error in counsel to think that every statement made by this court, when passing upon the sufficiency of evidence to justify a conclusion in a particular case, should be incorporated into instructions given to the jury as a guide to the jury in determining the probative force of testimony submitted to it. In *Mallow's* case, this court was discussing the weight of the evidence, in that particular case, for the purpose of determining whether or not the conclusion of the trial court upon the whole record was justified, and the language quoted was used in that connection. It would be subversive to justice to require the court, in its instructions to the jury, to take up separately each item of evidence offered by contestants to show want of mental capacity, and say to the jury, as to each item so separately considered, that it did not, in and of itself, disconnected from all the other testimony, show want of mental capacity. As said before, the evidence is to be considered by the jury as a whole. Each part depends for its probative force largely upon the other testimony submitted upon the issue. Each fact cannot, and ought not, to be considered by the jury alone and disconnected from the other, in the final analysis of the whole case.

In support of proponents' claim that the court erred in refusing to give the twelfth instruction, the proponents rely

upon *In re Winslow's Will*, 146 Iowa, 67. The court in that case approved the following instruction: "Medical men have been called as witnesses in this case, and they gave an opinion as to the mental condition of the said Sarah E. Winslow founded on personal knowledge, observation, and treatment of the deceased. The attending physician is presumed to know the state of mind of his patient. This testimony, and the testimony of medical men, if shown by the testimony to be men of experience in cases of this character, when they have testified touching the mental condition of the testatrix at or about the time of the execution of the will, based upon knowledge, observation, or treatment, may be given by you more weight and consideration than the testimony of non-professional witnesses, but this is a question for you to determine, and you are to say and determine the value and weight that such opinions are to have with you bearing upon the deceased's mental condition, and give them weight accordingly."

Instruction No. 12, asked by proponents, reads as follows: "In this case proponents have introduced testimony, as to the mental condition of W. E. Jones, of practicing physicians who have treated him for a number of years up to the date of his death, and who have given an opinion as to his mental condition, founded on personal knowledge, observation, and treatment. The attending physician is presumed to know the state of the mind of his patient, and these are facts that should be considered by the jury in determining the weight that should be given to their testimony." This instruction was intended to call particular attention to the testimony of the witnesses called by proponents, and to give them a certificate of character and their testimony probative force, without reference to the thought, without suggestion to the jury to consider the fact, as to whether or not these men were shown by the testimony to be experienced in cases of this character; as to whether or not they have shown themselves qualified, by their observation and treatment, to give

a more weighty opinion as to the mental condition of testator. The instruction in the *Winslow* case was only to call the mind of the jury to a distinction between the probative force of the testimony of experts, so shown to be qualified to speak, and that of nonexperts, not so qualified.

Some complaint is made of the instructions given by the court, especially the second and eighth. We have examined these instructions with care, and find they have support in the law as heretofore announced by this court, and it is unnecessary to restate the reasons upon which their approval rests.

The objection to the eighth instruction seems to be that the jury were told in the instruction that they might take into consideration the evidence, as disclosed upon the trial, relating to the financial condition of contestants. It is claimed that the instruction did not confine the jury, in a consideration of this phase of the case, only in so far as a knowledge of the conditions of contestants financially was brought home to decedent. But, as heretofore stated in this opinion, there was ample proof of the fact that whatever the condition of contestants was financially, a knowledge of their condition was brought home to decedent before the making of the will. In view of the whole record, we think there was no reversible error in the failure of the court to limit this phase of the case to the point contended for by appellants.

A motion was filed by appellants to dismiss this appeal on the ground that all parties interested in the contest were not served with notice of the appeal. In view of the disposition made of this appeal, we do not find it necessary to pass upon this motion.

We would suggest, however, that in contests of this kind it would be well for the court to see to it that all parties interested in the contest, or whose rights might be affected by a determination of the issues raised in the contest, should be served with notice and made parties of record before the trial is permitted to proceed. This will have the effect of

10. SAME: instructions: conformity to evidence.

avoiding much litigation, and enable the court, in one proceeding, to determine the rights of all parties, who are affected thereby.

Under the record made here, we find no ground for dismissing the appeal, and the cause, upon the whole record is—*Affirmed.*

LADD, C. J., and DEEMER and EVANS, JJ., concur. WITHROW, J., took no part.

S. B. BEATTY V. ANN J. SNOUFFER, Administratrix, and FRANCES BENJAMIN and VIRGINIA MCCLELLAND, Appellants.

Estates of decedents: CLAIMS: ALLOWANCE: EVIDENCE. In this proceeding to establish a claim against an estate the evidence while in conflict, is held to be sufficient to support the order of the trial court allowing the same.

Same: EVIDENCE: TRANSACTIONS WITH A DECEDENT. Where it appeared that decedent came into possession of funds belonging to claimant in his absence and through another, the testimony of claimant as to the amount received by decedent was not objectionable under section 4604 Code.

Same: CLAIMS: INTEREST. A claim once allowed with the approval of the administrator should draw legal interest from that date, even though the allowance was set aside at the instance of an interested party and afterward re-established.

Appeal from Linn District Court.—HON. MILO P. SMITH, Judge.

TUESDAY, APRIL 14, 1914.

A claim of S. B. Beatty, in due form, was presented to the administratrix of the estate of J. J. Snouffer, deceased, who, on December 18, 1906, consented to its allowance, and

it was allowed by the clerk of the district court on the following day. On March 23, 1911, on motion of Mrs. Frances Benjamin, a daughter of deceased, the order of allowance was set aside; a demurrer to the application having been overruled. Trial was had to the court, and on May 6, 1912, the claim was established, without interest. Both parties appeal; that of plaintiff being docketed separately. *Reversed* on plaintiff's appeal, and *Affirmed* upon that of defendant.

J. H. Preston and M. J. Donnelly, for appellants.

Jamison, Smyth & Hann, for appellee.

LADD, C. J.—I. The claim of \$1,195 was allowed S. B. Beatty against the estate of J. J. Snouffer, deceased, on December 19, 1906, with the approval of the administratrix, and was based on a ledger account of the
 1. ESTATES OF DE-
 CEDENTS:
 claims: allow-
 ance: evidence. deceased showing a balance of that amount owing the claimant. This much was well established by the evidence. The deceased had held notes and securities for the claimant pending some family troubles, and this is claimed to have been the balance on hand, and the only debatable question in the case is whether certain payments for the claimant were made before or after the entry of this balance in the ledger.

On the 11th day of November, 1905, Snouffer paid for claimant attorney's fees to Jamison & Smyth \$1,325, and on December 11, 1905, \$450 to Smith & Smith and M. P. Smith. These, if made after the date of the entry, would more than exhaust the balance on hand.

It is difficult to ascertain the facts with any degree of certainty from the record before us. On the claim as filed was pasted a typewritten statement, signed by the administratrix, in words following: "Cedar Rapids, Iowa, June 1, 1906. This is to show that Mr. J. J. Snouffer had in his hands money belonging to Mr. S. B. Beatty in the sum of one

thousand one hundred ninety-five (\$1,195) dollars at the time of his death, which is a just and valid claim against the estate of said J. J. Snouffer as shown by the books of said J. J. Snouffer."

Mr. Smyth testified that, as he recalled it, the claimant and the administratrix were in the office of Jamison & Smyth at the time and talked the matter over, and that the administratrix said that she "had looked it up on the books and knew it was correct," and, further, that she would pay for it. He testified further that Mr. Jamison dictated a statement to the typewriter at the time. Mr. Jamison had a like recollection, and testified further that the deceased, at the time \$1,325 was paid to his firm, said to him that he then held \$4,000 or \$5,000 of claimant's money in his possession. The clerk in the office also testified that the administratrix was present when the paper was dictated and signed, and that he thought claimant was also there. On the other hand, the administratrix testified that she had no such conversation, and that she assented to the claim at the suggestion of Mr. Jamison. According to claimant's story, he was in Montana at the time the above statement was signed, but that he had a conversation with the administratrix before going in which she had said the amount claimed was due him, and that "the books showed it"; that upon his return he had called her attention to the fact that the account was in Snouffer's handwriting, and she had said, "Yes, she had signed it, and it was correct." He testified further that the deceased had shown him his ledger exhibiting a balance owing him of \$1,195 in Snouffer's handwriting just before he went to Montana; where he remained a year; that he left for that state in the fall, late in the fall. "I would say November or December." On redirect examination he added: "I gave the wrong day as to when I went to Montana. It was earlier." On being recalled, after the payments mentioned had been proven, he testified: "I did not pay Judge Smith the \$450. It was paid out of my account. I did not pay the \$1,325 to Jamison & Smyth. What was owed

to me after the payment due each one, I gave Mr. Snouffer that money, and he paid it except Crosby, I think. I don't know whether I gave the money or check. I say that I knew Snouffer owed me \$1,195. When he negotiated this settlement, I paid it, and still let him owe me the \$1,195." This was without objection, and tended to explain how the balance may have continued on the book unchanged, and that the payments were before his departure for Montana.

Enough of the evidence has been recited to indicate that there was room for either conclusion as to whether these payments had been made by deceased from money in his hands exhausting this balance. The finding of the court, as is conceded, must be accorded the same effect as the verdict of a jury. We entertain much doubt as to the correctness of the court's conclusion. It certainly has evidence for its support, and, for this reason, we cannot interfere.

II. In the course of his examination, claimant was asked: "How much did Mr. Snouffer receive of money and property in his hands while he was taking care of your matters?"

2. **SAME: evidence: transactions with a decedent.** Objection that the witness was incompetent under section 4604 of the Code was overruled, and the witness answered: "He had nearly \$5,000 at one time—\$4,000—well put in \$5,000." His previous testimony disclosed that deceased obtained his (claimant's) notes and securities from Hedges in claimant's absence, so that the inquiry did not necessarily involve a transaction between him and the deceased, and the court rightly did not so assume when the record indicated otherwise. There was no error.

III. The court, in allowing the claim, excluded interest prior to May 6, 1912, the date of the entry. It was for a balance owing by the deceased at the time of his death, and we know of no reason why the indebtedness should not draw interest at the legal rate from the time of the allowance of the claim when first filed on December 19, 1906. It had been allowed with the approval of the

3. **SAME: claims: interest.**

administratrix, and on the subsequent trial this was confirmed. The order of allowance, then, should have been reinstated, or interest from December 19, 1906, should have been included.

On plaintiff's appeal, reversed, but with costs, except for printing brief taxed against plaintiff. On defendant's appeal—*Affirmed*.

DEEMER, GAYNOR, and WITHBOW, JJ., concur.

G. L. ASCHAN, Appellee, v. J. E. McDERMOTT and O. A. BEVER, Appellees; JOHANNA ASCHAN, GUARDIAN OF IDA MATILDA ASCHAN, ESTHER CORIN ASCHAN, CARL WILLIAM ASCHAN, VADA WILHELMINA ASCHAN and JOHN EDWIN ASCHAN; and IDA MATILDA ASCHAN, ESTHER CORINNE ASCHAN, CARL WILLIAM ASCHAN, VADA WILHELMINA ASCHAN and JOHN EDWIN ASCHAN, Appellants.

Judgments: WHEN CONCLUSIVE. Where the court has jurisdiction of
1 the subject matter and of the parties at the time of entering an order, the order is final and binding upon all the parties; and any attempt of the judge in vacation to set the order aside would be of no effect.

Guardianship: DISTRIBUTION OF FUNDS: NOTICE TO MINORS: GUARDIAN
2 **AD LITEM.** In the distribution of funds derived from the sale of a decedent's real property and in the hands of a guardian, the duly appointed guardian of minors represents them, and it is not necessary that notice of the application of distribution shall be served on the minors, or that a guardian ad litem be appointed, unless the action of the regular guardian is in its nature adverse to them.

Estates of decedents: ORDER OF DISTRIBUTION: FRAUD: EVIDENCE. A
3 judgment may be set aside on the ground of fraud, but in such cases the fraud and deceit practiced must have prevented the unsuccessful party from having a fair trial. Thus where one claiming to be an heir of decedent, though in fact there was no relationship, made application for distribution to him of a share in decedent's estate and the widow, who was guardian of the other children, had

full knowledge of applicant's relation to the estate and of the grounds on which he claimed an interest therein, and was in no manner circumvented or prevented from urging applicant's want of relationship to defeat his right, no such showing of fraud was made as would authorize a vacation of the order of distribution.

Same: JUDGMENTS: WHEN CONCLUSIVE. While in a technical sense
4 an order for distribution of the funds of an estate is not a judgment, it is a final adjudication of the rights of parties, and is conclusive unless appealed from or set aside in some direct proceeding.

Appeal from Dallas District Court.—HON. LORIN N. HAYS,
Judge.

THURSDAY, FEBRUARY 19, 1914.

THIS action, as here presented, is on defendants' cross-petition, in which they seek to recover, from the plaintiff, certain moneys belonging to the estate of Carl Aschan, claimed to have been wrongfully obtained by the plaintiff from the defendants under an order of court, procured through the fraud of the plaintiff in representing himself to be one of the heirs of the estate. Decree dismissing defendants' cross-petition. Defendants appeal.—*Affirmed.*

F. G. Ryan, for appellants.

C. J. Eller and White & Clark, for appellee, G. L. Aschan.

GAYNOR, J.—On the 18th day of July, 1911, the plaintiff, G. L. Aschan, filed his petition in the district court of Dallas county, in which he claimed that he was entitled to a one-sixth interest in certain land belonging to the estate of Carl Aschan, then deceased, and asking that his interest therein be established, and that such interest be quieted in him. His petition was in three counts. In the first count he claimed that he is a child of said Carl Aschan. In the second count he alleged that

he was an adopted son of Carl Aschan. In the third count he alleged that in 1866 the said Carl Aschan orally agreed with plaintiff's father that, if he would surrender and give to him the said child, he would adopt him as his own, and that he should inherit as his own child; that he was surrendered by his father to Carl Aschan under said agreement; that said Carl Aschan took possession of him; and that he lived and labored with the said Carl Aschan as a member of his family until after he became of age. Other facts are alleged in the petition tending more or less to sustain and exemplify these claims.

The defendants are the children and heirs at law of Carl Aschan, except the defendant Johanna Aschan, who is their mother and guardian. They each deny plaintiff's claims.

Upon the issue thus tendered, the court found for the defendants, and the plaintiff has not appealed. The defendants, however, filed a counterclaim or cross-petition against the plaintiff, in which they ask judgment against him for \$862.05, and as a ground for such claim allege that there had been a former sale of certain land belonging to the estate of Carl Aschan, and that plaintiff wrongfully obtained an order for a distribution of the money received from the sale on the ground that he was a son of Carl Aschan, and that under said order the money was wrongfully paid to the plaintiff, and that the heirs of Carl Aschan, defendants herein, are now entitled to receive it back.

It appears from the record that the plaintiff is a Swede; that Carl Aschan was also a Swede; that they both resided in Sweden; that the father of the plaintiff, having custody and control of the plaintiff, turned the plaintiff over to Carl Aschan and his former wife, who were then about to remove to America; that the Aschans were childless; that they took the child and brought him to America; that he lived with them as a member of their family until after the death of Mrs. Aschan, the former wife, and continued to so live up to the time he became of age; that they became greatly attached to

him; that he was always treated as a son; that he took their name; that they introduced him to their friends and neighbors as their son, sometimes as their adopted son, and frequently spoke of their intention to leave their property to him when they should die; but that he was never, in fact, adopted. And the court found, as a matter of law, that he was not entitled to inherit anything from the estate of Carl Aschan; that he was neither a child by birth nor adoption. Plaintiff has not appealed, and we have no concern about this finding of the court. Defendants, having appealed, urge that they were entitled to judgment against the plaintiff for the amount received by him from the estate of Carl Aschan. Upon this question, the record shows that on or about the 21st day of April, 1897, Carl Aschan died, leaving surviving him his widow, Johanna Aschan, and the following named children: Ida Mathilda, age one year; Vada Wilhelmina, age three years; Carl William, age five years; Esther Corinne, age seven years; and John Edwin, age eight years.

On the 11th day of May, 1897, the plaintiff in this case was appointed administrator of the estate of Carl Aschan, and duly qualified and gave bond. On the 27th day of May, 1898, he filed his final report, as such administrator, and was duly discharged.

Johanna Aschan was appointed guardian of the minor children of Carl Aschan and procured an order from the court for the sale of certain real estate of the said Carl Aschan, which resulted in her receiving from said sale the sum of \$7,758.50. That amount she held in her possession as the proceeds of such sale. Thereafter, and on the 15th day of March, 1909, the plaintiff herein filed the following application in the matter of the guardianship of the heirs of Carl Aschan, deceased, which was duly verified:

Comes now your petitioner, G. L. Aschan, and states: That the heirs of Carl Aschan, deceased, are as follows: Johanna Aschan, wife of deceased, Ida Matilda Aschan, Esther Corinne Aschan, Carl William Aschan, Vada Wilhelmina

Aschan, John Edwin Aschan, and your petitioner, G. L. Aschan, children of deceased. That in accordance with an order of court granted March 24, 1908, Johanna Aschan, guardian of the minor heirs of Carl Aschan, deceased, has sold a certain portion of the estate of deceased for the net sum of \$7,758.50. That \$858.50 of said sum is in cash and the remaining \$7,000 in secured notes payable on the following terms, to wit: \$1,000 payable March 1, 1910; \$200 payable March 1, 1912; \$600 payable March 1, 1913; \$600 payable March 1, 1914; \$600 payable March 1, 1915; \$4,000 payable March 1, 1915. That your petitioner's share of the proceeds of said sale is one-sixth of two-thirds of \$7,758.50, or \$862.05. That he has attained his majority and is entitled to receive his share of the proceeds at once. That, in order to effect the division necessary to enable the said Johanna Aschan to transfer and pay over to your petitioner his share, your petitioner is willing to receive in payment thereof the note for \$200, payable March 1, 1912, and the note for \$600 payable March 1, 1913, and the balance of \$62.05 cash. Wherefore your petitioner prays the court that Johanna Aschan, guardian of the minor heirs of said estate, be authorized and empowered to transfer over to your petitioner, G. L. Aschan, the sum of \$862.05, payable according to the terms above set out.

Thereupon the court made the following order:

The court, having read the foregoing application and being fully advised in the premises, hereby authorizes the said Johanna Aschan to transfer and pay over to G. L. Aschan, in the manner and terms set out in the foregoing application, the sum of \$862.05 as his share of the proceeds of said sale.

Thereafter the judge of said court, on the 1st day of May, 1909, on his own motion and without notice to the plaintiff, and, as we understand it, in vacation, because, as he says in his testimony, he felt that he had been misled at the time the first order was made, and that there had been in fact a concealment from the court in reference to G. L. Aschan's relationship to Carl Aschan, entering the following order:

Now on this 1st day of May, 1909, the matters in connection with said estate being presented to the court for consid-

eration, and it appearing to the court that on the 27th day of March, 1909, there was presented an application for an order authorizing the guardian to apportion proceeds of funds then in her hands to one G. L. Aschan, as a child of the deceased, having attained his majority, and that thereon an order was made approving the transfer of two notes in the sum of \$800 and the payment of \$62.05 cash to the said G. L. Aschan, as the child, from the proceeds of the estate. It now appearing to the court that the said G. L. Aschan was not a child of deceased, Carl Aschan, or at least that the relationship of the said G. L. Aschan to the said Carl Aschan being seriously in doubt, and no showing having been made that the said G. L. Aschan is entitled to any part of the estate of Carl Aschan, the order made and entered by the court upon said application and the approval thereof is now hereby rescinded and canceled, and the action of the said Johanna Aschan, guardian, in the settlement and transfer and payment of notes and money to the said G. L. Aschan is disapproved.

It appears that all the information that Judge Nichols obtained upon which he based this last order was from conversations had with the guardian of these minor defendants and the attorneys interested in the controversy. It also appears that the guardian had complied with the first order and had delivered to the plaintiff the notes and money, as therein ordered, and this before the second order was made. It also appears that the guardian of these minors had knowledge of the application made by the plaintiff for distribution at the time it was made, and the application was verified by her attorney, although at the same time, he acted for the plaintiff in this matter.

We would gather from the whole record that the plaintiff honestly believed that he was entitled to share in the estate of Carl Aschan at the time he made the application, and we would infer, from the fact that the guardian did not protest against it, that she also believed or, if she did not believe, consented to his sharing at that time in the estate of Carl Aschan, as heir or otherwise. There was no actual or intentional fraud perpetrated on the court. It is apparent that

both parties, at the time this first order was made and at the time it was complied with by the guardian, believed that the plaintiff was entitled to what he received.

The defendant's counterclaim against the plaintiff is based upon the theory that the first order of distribution, in which plaintiff received the \$862.05, was wrongfully entered, and that fraud was practiced upon the court in entering it, and that therefore the second order, made by the judge on his own motion, supersedes the first order, and defendants are now entitled to recover that amount from the plaintiff.

The court from which this appeal is taken made the following finding of fact touching this matter:

The guardian reported the sale of the property to the court, and the court approved the sale without any order made as to what should be done with the funds, or as to what interest, if any, defendants had therein; that the petition of the plaintiff for distribution, in which he asked to be recognized as one of the heirs, was presented by the attorney of record who appeared for the guardian in the original case in which the sale of the land was made; that on the same day Johanna Aschan, as guardian of these minors, filed her application with the court in the same case, asking that she be allowed the sum of \$200 for the support of the minors; that both these applications were made at the same time, both applications were presented by the same attorney, and the orders entered on the same date; that, on the 1st day of May following, the judge, who made the order, filed a revocation of the same, but, before this revocation was made, the order, as it appears, had been complied with by the guardian, and the money paid under it.

This controversy turns upon the force and effect to be given to the first order made by the court directing the guardian to pay to the plaintiff the \$862.05 which the guardian now seeks to recover back.

If the court had jurisdiction of the subject-matter and

of the parties at the time the order was made, it became a final and binding order upon all parties affected by it, over whom the court had jurisdiction, and any attempt by the judge in vacation to set aside and nullify the order made by the court would be void and of no effect.

1. JUDGMENTS :
when conclu-
sive.

It is not true, as counsel contends, that, in the making of these orders for the distribution of funds in the hands of the guardian, it is necessary that notice of an application for the order of distribution shall be served upon

2. GUARDIANSHIP :
distribution of
funds : notice to
minors : guar-
dian *ad litem*.

the minors, or that they shall be required to be represented by a guardian *ad litem*. Their duly appointed guardian represents them for all purposes connected with the settlement of the estate, except where the action of the guardian is adverse in its nature to their interest, such as in the sale of real estate belonging to the minors. See *Brewer v. Stoddard*, 49 Iowa, 279.

The guardian of these minors, who is now seeking to recover this money back from the plaintiff, had full knowledge, as it appears from the record, of the relationship of the

plaintiff to the estate and the grounds upon which he predicated his right to participate in the estate. She was in no way circumvented or prevented by the plaintiff from asserting

3. ESTATES OF DE-
CEDENTS : order
of distribution :
fraud : evi-
dence.

in that proceeding what she now claims to be a fact. Nor was there any fraud practiced on her which prevented her from making known to the court the facts which she now urges and says defeats the plaintiff's right to participate in the estate. With full knowledge of all the facts which she now asserts, she complied with the order of the court and paid to the plaintiff this money. The order directing the guardian to pay the plaintiff this money was a final order, properly entered of record by the court, and so binding upon all parties, unless appealed from or set aside by some direct proceeding, and the trial court acted without authority in law in setting aside this

order on his own motion, without notice to the plaintiff, and in vacation.

The fraud which will authorize the setting aside of a decree or judgment must be such as prevents the unsuccessful party from having a trial. As said in *United States v. Throckmorton*, 98 U. S. 65 (25 L. Ed. 93):

Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing (citing many cases). In all these cases, and many others which have been examined, relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

In *Pico v. Cohn*, 91 Cal. 129 (25 Pac. 970, 13 L. R. A. 336, 25 Am. St. Rep. 159), the court said:

That a former judgment or decree may be set aside and annulled for some fraud there can be no question; but it must be a fraud extrinsic and collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of the rule is that there must be an end of litigation; and when persons have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, . . . it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that

the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy.

In *Graves v. Graves*, 132 Iowa, 205, it is said:

While there are suggestions in argument in some particular cases which seem to indicate that false swearing may be a ground for vacating a judgment (*Heathcote v. Haskins*, 74 Iowa, 566; *Brown v. Byam*, 59 Iowa, 52), yet in neither case was the question squarely decided. In all other cases, where new trials were granted, there was some active fraud, omission, or concealment, some extrinsic or collateral acts, not involving the merits of the case. In *Tucker v. Stewart*, 121 Iowa, 714, we said that the rule announced by the Supreme Court of the United States, in *United States v. Throckmorton*, is that uniformly followed in this state. This settles the matter for this jurisdiction, and we need only restate the doctrine, which is that false swearing or perjury alone is not ground for setting aside or vacating a judgment. But if accompanied by any fraud, extrinsic or collateral, to the matter involved in the original case, sufficient to justify the conclusion that but for such fraud the result would have been different, a new trial may be granted.

See, also, *Kwentsky v. Sirovy*, 142 Iowa, 385, in which the matter now under consideration was fully discussed.

But it is contended that this order was not a judgment or decree such as is contemplated in the foregoing decisions, and reliance is had upon *Latham v. Myers*,
4. SAME: judgments: when
conclusive. 57 Iowa, 519; *McGee v. Allison*, 94 Iowa, 527; *Corbin v. McAllister*, 144 Iowa, 71.

It is true, in a technical sense, the order made was not a judgment, but it was a final order, establishing rights and directing the party against whom it was made to perform as therein directed. Though not a judgment, it is an adjudication by a court having authority and jurisdiction to determine and decide the matter, and it appears that the order has been fully performed by the party against whom it was directed. Though not a judgment, it has the same force and effect, so far as it adjudicates the matters before the court,

and is final and conclusive unless appealed from or set aside by some direct proceeding. It establishes and settles the rights of the parties, in respect to the matter therein determined, and the same rule governs the parties in respect thereto as in any other decree or adjudication when attacked for fraud.

In this case, however, there was no fraud practiced by the plaintiff. He believed, and from the record we are justified in saying he had reason to believe, that he was entitled to what he asked for. Up to that time the guardian, who is now complaining, was of the opinion, and acted upon the theory, that he was entitled to participate in the estate. She cannot urge now her own negligence or carelessness to avoid the effect of the order so made by the court.

Since the appeal in this case was taken, the defendants have filed a motion in the probate court to set aside the first order made by Judge Nichols, and for this reason the plaintiff has moved to dismiss the appeal in this case. We think there is no merit in this motion, and the same is overruled.

We find no reason, in fact or in law, for disturbing the decree of the court herein entered, and the same is therefore—*Affirmed.*

LADD, C. J., and DEEMER and WITHROW, JJ., concur.

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ABSTRACT OF TITLE

TO

ACTIONS

ABSTRACT OF TITLE. See REAL PROPERTY.

ABUSE OF PROCESS. See ATTACHMENTS.

ACTIONS.

Certiorari: Notice of hearing. Where no stay of proceedings in the lower court was demanded under a writ of certiorari, service of notice of hearing upon the court below was not a condition precedent to the issuance of the writ. *Dalton v. District Court*, 187.

Same: Application of writ. Where the court had jurisdiction of the subject matter and the parties in a suit for libel, an order for the production of defendant's books showing the circulation of the paper in which the alleged libel was published is not reviewable by certiorari; as there is a complete remedy in such cases by appeal. It is only where the court has acted illegally that certiorari is available. *Idem*.

Intervention. To entitle a party to intervene in an action between others he must have an interest in the subject of litigation, and must either join the plaintiff in claiming what is sought by the petition, or unite with the defendant in resisting the claim of plaintiff, or present a demand adverse to both plaintiff and defendant. He cannot come into the action upon an independent right of action which will be in no way affected by the outcome of the original controversy. Thus the makers of usurious notes cannot intervene and assert usury, in an action for specific performance of a contract providing that defendant should accept such notes as part of the consideration, which action was defended on the ground that the notes were usurious. *Steltzer v. Compton*, 465.

Trial in equity: Transfer of cause: Waiver. Where the facts pleaded in the petition to enjoin defendant from trespassing or interfering with plaintiff's possession of certain lots clearly entitled him to some form of relief, if true, but defendant claimed that the remedy was at law, his failure to move for a transfer of the cause

ACTIONS Continued **TO** **AGENCY**
to the law side of the docket was a waiver of any error in trying the case as an equitable action. *Kamrar v. Butler*, 293.

ACCOUNTING.

Presumption: Matters involved. Where there was an accounting between the owner and a cropper of land, which involved the dealings of the parties, it will be presumed that all claims between the parties were settled, including a claim for services upon the farm, in the absence of an affirmative showing otherwise. *Farmer v. Underwood*, 587.

ACCRETIONS. See **WATERS.**

ADMINISTRATORS. See **ESTATES OF DECEDENTS.**

ADULTERY. See **CRIMINAL LAW—MARRIAGE AND DIVORCE.**

ADVERSE POSSESSION. See **TENANCY.**

AGENCY.

Brokers: Action for commission: Evidence. In this action for a broker's compensation the evidence is reviewed and held to support a finding that defendant engaged plaintiff to make an exchange of his farm, that he produced a party with whom an oral contract of exchange was made, ready, able and willing to perform, no objection being then made by defendant to an existing mineral lease. *Allgood v. Fahrney*, 540.

Action for commission: Performance of contract. An agent performs his contract to procure a purchaser of land when he produces a buyer ready, able and willing to purchase on the terms proposed, or which are acceptable to the owner. To entitle him to his commission the offer need not be made directly by the purchaser to the owner; it will be sufficient if made under such circumstances that the seller may be required to execute a binding contract. Thus where the purchaser was within calling distance when the agent communicated to the owner the offer of the purchaser, who was ready and willing to reduce the offer to writing if desired, the contract of agency was sufficiently performed to entitle the agent to his compensation. *Beamer v. Stuber*, 309.

Subsequent wrongful act of owner: Evidence. Where the agent found a purchaser ready, able and willing to purchase on the terms proposed by the owner, the subsequent act of the owner in con-

AGENCY Continued

TO

APPEAL

veying the property to another would not affect his right to his commission. In the present case the evidence is held insufficient to show that defendant made a pretended sale to another and through him to a purchaser procured by plaintiff, for the purpose of defeating his commission. *Idem.*

Same: Evidence. It is incumbent upon a real estate broker when suing for a commission to show that the purchaser produced by him was willing to enter into a binding contract on the terms proposed, and the testimony of the proposed purchaser to that effect is competent. *Idem.*

Same: Evidence: Prejudice. In this action for commissions for procuring a purchaser, in which plaintiff contended that defendant made an intermediate sale to another party for the purpose of defeating his right to commissions, the evidence of the attorney who prepared the contract of sale that in securing the assent of the purchaser to a substitution of the intermediate purchaser as seller, instead of the owner, he explained that it was done to avoid the payment of two commissions, was inadmissible; and in view of the fact the attorney was an unbiased witness its admission was not only erroneous but extremely prejudicial as well. *Idem.*

Same. In an action for commission for the sale of land it is competent to show why the sale to the proposed purchaser was not consummated. *Idem.*

APPEAL. See EMINENT DOMAIN.

Direction of verdict: Waiver of motion: Sufficiency of evidence: Review. By the introduction of evidence after a motion for a directed verdict at the close of plaintiff's case for insufficiency of the evidence, the defendant waives any error in the ruling upon the motion: and unless the question is again properly raised during the trial the sufficiency of the evidence to support the verdict will not be reviewed on appeal. *Vogt v. Railway Co.*, 158.

Dismissal. Where two appellants dismissed their appeal after it had been perfected, they were not entitled to a dismissal as to the remaining appellant because of his failure to serve notice of appeal on them thus making them appellees. *Kinthead v. Peet*, 65.

Findings of fact: Conclusiveness. The findings of fact by the court in a law action when supported by the evidence are not reviewable on appeal. *Hoyt v. Griggs*, 672.

APPEAL Continued

TO

ARGUMENT

Law of the case. The ruling upon a former appeal that the evidence of waiver of a provision of the contract of sale was sufficient to take that question to the jury, constitutes the law of the case on a retrial on substantially the same evidence. *Reeves & Co. v. Younglove*, 151.

Rejected evidence: Necessity for offer of proof. Error for the rejection of evidence cannot be urged on appeal, in the absence of anything in the record to show what the testimony of the witness would have been if received. *Gittings v. Duncan*, 373.

Review of court findings. Where the evidence upon material issues in an equity case was conflicting, the findings of the trial court who saw and heard the witnesses will be given some weight by the appellate court. *Conn v. Converse*, 604.

Reviewable assignments of error. The appellate court will not pass upon assignments of error in a law action, upon which the trial court has not had an opportunity to rule. *Vogt v. Railway Co.*, 158.

Supersedeas bond: When judgment may be stayed. The right of appeal ordinarily carries with it the statutory right of staying enforcement of the judgment appealed from by the filing of a supersedeas bond, the office of which is to preserve the status quo of the parties; but in case the judgment or order has been previously executed, or is self-executing, there is nothing upon which the supersedeas bond can operate, and the filing of the same in such cases would be inoperative. *Haddick v. District Court of Polk County*, 417.

Trial de novo. An action to set aside an alleged fraudulent conveyance is triable de novo on appeal, and the appellate court will examine the evidence and determine the ultimate facts. *Robertson v. U. S. Live Stock Co.*, 230.

Motion for directed verdict: Waiver. Where a defendant proceeds to introduce its evidence, after the overruling on a motion to direct a verdict at the close of plaintiff's case, it cannot complain of the ruling on appeal. *Finnane v. City of Perry*, 171.

Verdict upon conflicting evidence. The verdict of a jury rendered upon conflicting evidence is conclusive of the issue on appeal. *Gittings v. Duncan*, 373.

ARGUMENT. See NEW TRIAL.

ASSAULT

ASSAULT.

Assault and battery: Evidence. In this action for damages for assault and battery the evidence is held to present a case for the jury. *Moran v. Martinson*, 712.

Same. A witness who visited plaintiff the day following an alleged assault and battery was competent to testify that she said she was not feeling well; as there was nothing in the statement tending to give a reason for her condition, or to explain the alleged assault. *Idem*.

Same: Self-defense: Instruction. When one has been assaulted he may use such force in repelling the attack as then appears reasonably necessary to protect himself from imminent injury; the instruction in the instant case restricting defendant to the use of necessary force, rather than such as appeared to be reasonably necessary, was erroneous. *Idem*.

Same. The right of self-defense arises when one has been assaulted; and when such defense is in the case the court should properly instruct thereon, even though no request was made, a failure to do which constitutes error. *Idem*.

Same: Conflicting instructions. Where the court instructed that the burden was on plaintiff to show that she was assaulted when upon the public highway and in the peace of the state, the further instruction that the undisputed evidence showed that plaintiff was trespassing upon defendant's premises, and illegally carrying a revolver on the Sabbath, and which permitted recovery without proof of the facts required in the former instruction, was conflicting and erroneous. *Idem*.

Use of force in the defense of property: Instructions. Where another is rightfully in possession of personal property the owner is not justified in committing an assault for the purpose of regaining possession of the same; but having a right of possession and to enter the premises of the other for the purpose of removal he may defend his possession thus acquired by consent with the exercise of reasonable force: and where the evidence tends to support the contention that possession was acquired by consent of the other party the jury should be instructed as to the right to exercise force in defense thereof. *Biggs v. Seufferlein*, 241.

ATTACHMENT

ATTACHMENT. See MALICIOUS PROSECUTION.

Abuse of process: Evidence. In an action for abuse of process in the levy of an attachment the defendant may show that he had good grounds for proceeding in that manner, that he endeavored to settle the claim with plaintiff after the levy, and what plaintiff had stated when he made a bill of sale of the property levied upon, as bearing on the questions of probable cause and of malice. Defendant should also have been permitted to show in this case that plaintiff made a bill of sale to the property levied upon, signed by himself alone, in resistance to his claim that the property was exempt. *Shadden v. Butler*, 1.

Same: Probable cause: Evidence. In actions for abuse of process the plaintiff must prove want of probable cause; and this cannot be shown by proof of malice alone, although malice may be inferred from want of probable cause. The instructions in this case were erroneous in failing to require proof of probable cause. *Idem*.

Same: Malice: Instructions. Instructions submitting the question of malice, in an action for abuse of process, bearing simply on the question of exemplary damages and not on the question of plaintiff's right of recovery, were erroneous. *Idem*.

Garnishment: Liability of garnishee. The liability of a garnishee is no greater than that of the judgment debtor: and in the absence of some fault on his part he will not be put in a position where he may be compelled to pay the debt twice. *Dickinson v. Davis*, 449.

Same: Property subject to garnishment. In the instant case the garnishee bank was not liable as such because holding a note of the judgment debtor as purchaser and indorsee; as the judgment debtor was primarily liable on the note and would have no right in it until he paid it, and the judgment creditors' rights were only those of the judgment debtor. *Idem*.

Same: Liability of garnishee. A garnishee is not liable for indebtedness due the judgment debtor, where a note evidencing the indebtedness had been transferred by the judgment debtor to another as collateral security; as the garnishee would not be owing anything until the note was transferred back to him. *Idem*.

Same. Where a bank as garnishee held collateral of the judgment debtor to secure an indebtedness, the plaintiff was entitled only to

ATTACHMENT Continued TO ATTORNEYS
a contingent judgment against the bank, either giving the right to the collaterals after paying the bank's claim, or providing that the bank should collect the collaterals and, after deducting its own claim, pay the balance to the plaintiff. *Idem*.

ATTORNEY AND CLIENT. See ATTORNEYS.

ATTORNEYS' FEES. See ATTORNEYS—REAL PROPERTY.

ATTORNEYS.

Attorney and client: Recovery by attorney in same action. Ordinarily an attorney cannot obtain an adjudication in his own favor against his client, while representing his client in the same action, whether other attorneys are associated with him or not. *Kinhead v. Peet*, 65.

Attorney and client: Representation of parties with adverse interests. Plaintiffs were employed to prosecute an action for seduction and obtained a settlement, taking a note and mortgage as security. Subsequently they brought suit to foreclose the mortgage and establish their lien for services, making their client and the mortgagor defendants. Their client answered pleading her minority at the time of the settlement, and that upon reaching majority she disaffirmed the contract and repudiated the settlement. The mortgagor pleaded the same facts and also fraud in obtaining the settlement, and that a subsequent settlement was made with the seduced girl. *Held*, that the same attorneys ought not to have represented both the defendants, as their interests were adverse, and under the issues as made the court was powerless to protect the rights of the girl. *Hickman v. McDonald*, 50.

Attorney's lien: Recovery. Where attorneys were employed upon a contingent fee dependent upon the amount collected, and secured a settlement of the claim taking a note and mortgage as security payable to their client, but retained the possession thereof and claimed a lien thereon, a subsequent compromise settlement between the mortgagor and their client would not affect their right to recover on the security to the extent of their interest. *Idem*.

Taxation of attorney's fee. Where plaintiff tendered a quit claim deed with the statutory fee before bringing suit to quiet the title to her homestead against the lien of a judgment, the taxation of the statutory attorney fee was proper, although the judgment was not enforceable against the homestead and defendants were not seeking to enforce the same. *French v. Bartel & Miller*, 677.

ATTORNEYS Continued

TO

CHATTEL MORTGAGES

Taxation of attorney's fee. There is no statutory authority for the allowance of attorney's fees upon a promissory note by the supreme court, and a motion to that effect will be overruled where the plaintiff failed to file the statutory affidavit in the district court. *Hoyt v. Griggs*, 672.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS.

BREACH OF WARRANTY. See SALES.

BROKERS. See AGENCY.

BONDS. See APPEAL.

BOUNDARIES. See REAL PROPERTY.

CARRIERS. See RAILROADS.

Liability for loss of property. While a carrier may be held absolutely liable for the loss of property in transit, through the embezzlement or negligence of its servants, this rule of insurance does not apply where the damage results from the inherent character or quality of the shipment, and the only fault of the carrier is delay in shipment or delivery. *Brandeis v. Chicago, Burlington & Quincy Ry. Co.*, 702.

Same: Perishable goods: Submission of issue. Where an action for injury to a shipment of fruit was tried on the theory that defendant was negligent in failing to place the car upon an unloading track within a reasonable time after its arrival at destination, and not upon the theory that defendant was liable for damage as an insurer, the defendant could not complain of its submission on the theory of negligence, on the ground that a carrier is not liable as an insurer of goods of a perishable character. *Idem*.

CERTIORARI. See ACTIONS.

CHARITIES. See GIFTS—TRUSTS.

CHATTEL MORTGAGES.

Description: Addition to stock of goods. The printed provision of an ordinary chattel mortgage of farm property, that the same shall cover all increase from said stock, will not be construed to cover additions to a stock of goods, or substitutes therefor, made in the ordinary course of a mercantile business. An intention, how-

CHATTEL MORTGAGES Continued

ever, clearly expressed in the mortgage that it shall cover not only the existing stock, but additions and substitutions made in the ordinary course of business, is valid. In re Assignment of Thompson, 20.

Increase. It is not necessary that the increase of mortgaged personal property have a corporate identity at the time of the execution of the mortgage to be covered thereby, but it must be at least the increase of property which the mortgagor then had and in which he had a present interest. *Idem.*

Stock of goods: Sales and additions: Rights of parties. Where the mortgagor purchased a stock of goods from the mortgagee, both living in the same town, and the mortgagor openly sold from the stock, replacing the same with other goods which were mingled with those mortgaged, apparently with the consent of the mortgagee, each was entitled to claim such share of the whole as the property to which each was entitled bore to the whole mass. *Idem.*

Confusion of goods: Rights of parties. Where a loss occurs from a confusion of goods the party causing the confusion must suffer, if he is unable to distinguish and separate his property. Where the confusion is by the consent of the parties the relationship of the goods rests upon the agreement of the parties involved in the consent, and the presumption is that they are tenants in common. Where the confusion is tortious the loss will fall upon the party wrongfully creating the confusion, except where the property is all parts of equal value and ascertainable with respect to the whole, when each will be entitled to his own proportion; but the party chargeable with the wrongful confusion has the burden of distinguishing his own property. *Idem.*

Same. Where the confusion of goods is innocent, by mistake or negligently done, the party causing the confusion must be able to designate his own property or he will lose the whole to the other party: but where the equities of the parties are equal and the confusion resulted from inevitable accident each party has a common interest in the whole to the extent of his contribution thereto. *Idem.*

Stock of goods: Mortgage: Sales of additions: Rights of parties. Where the mortgagee of a stock of goods consented to a sale therefrom by the mortgagor in the regular course of trade, and other goods were purchased by him and substituted for those sold, neither was entitled to the whole stock but to his share in proportion to his contribution thereto. *Idem.*

CITIES AND TOWNS

TO

CONTEMPT

CITIES AND TOWNS. See MUNICIPAL CORPORATIONS.

COMMISSIONS. See AGENCY.

COMPROMISE AND SETTLEMENT.

Evidence of. An oral offer of compromise and settlement of a suit is not admissible in evidence; and efforts of counsel to get the matter before the jury, persisted in to the extent that the jury is fully advised on the subject, is reversible error, even though the jury were instructed not to consider the same. *Spaulding v. Leybourn*, 277.

Evidence: Admissions. Not all admissions made during negotiations for the settlement of a controversy are to be excluded as an offer of compromise. Where the evidence was competent for other purposes, and there was no showing that the statements would not have been made except for the purpose of effecting a settlement, it is admissible. *Wachal v. Davis*, 360.

Fraud: Evidence. In this action to abate as a nuisance the diversion of surface water in such manner as to wash dirt from an embankment and cause it to spread over plaintiff's land, to which defendant pleaded a settlement of all damages accruing, and plaintiff contended that his signature to the written settlement was obtained by fraud, the evidence is reviewed and held insufficient to show fraud. *Zaharyas v. Railway*, 71.

Fraud: Unreasonableness of settlement. Where it appeared that plaintiff's land consisting of twenty-four acres was of the value of \$60.00 per acre, two acres of which was covered with clay washed by heavy rains from defendant's embankment, and that the amount of land thus covered at the time of the claimed settlement for damage thus caused was the same as at the commencement of this action, a prior settlement with plaintiff for all damages, past, present and prospective, in the sum of \$250.00 was not so unreasonable as to constitute a circumstance in support of the claim of fraud in procuring the settlement. *Idem*.

CONDEMNATION OF PROPERTY. See EMINENT DOMAIN.

CONTEMPT.

An order requiring an administrator to turn over certain funds in his hands to another is not a self-executing order, but is an order requiring the administrator to perform an affirmative act, and

CONTEMPT Continued

TO

CONTRACTS

upon appeal he would be entitled to have enforcement of the order stayed by a supersedeas bond; and he would not be guilty of contempt for failing to perform the order pending the appeal. *Haddick v. District Court of Polk County*, 417.

Same. An order directing a substituted administrator to set aside a certain sum for the protection of plaintiff, pending his appeal from another order directing him to turn over certain funds in his hands to the substituted administrator, will not justify a judgment for contempt against plaintiff, because of his failure to perform the latter order while his appeal therefrom was pending, and after the giving of a supersedeas bond. *Idem*.

CO-TENANTS. See TENANCY.

CONTRACTS. See INFANTS—REAL PROPERTY—SURETYSHIP—NEGOTIABLE INSTRUMENTS.

Building contracts: Enforcement: Set-off. Plaintiff's assignor for the benefit of creditors, a subcontractor, purchased material from a manufacturer, which was used in the construction of a school building before the same was paid for. The manufacturer did not comply with Code Section 3102, but the school district paid the manufacturer and withheld the amount from the principal contractor. *Held*, that as the material-man failed to establish his claim against the district he had no preference as a creditor of the subcontractor, and the school district could not create a preference by unauthorized payment, and therefore the principal contractor could not offset such sum against plaintiff who completed the contract of his assignor. *Bain v. Bruce*, 327.

Building contracts: Performances: Acceptance: Payment. Where there has been substantial performance of a builder's contract the owner cannot avoid liability for payment of the contractor by a mere refusal to accept the building upon its completion. *Henry v. Jones*, 364.

Same. Where a building contract required the owner to pay the stipulated installments as the work progressed, with final payment upon completion and acceptance by the owner and architect, without regard to the architect's estimates or certificates, upon substantial completion of the contract the owner cannot plead failure of either himself or the architect to express approval of the building, in defense to a suit for the contract price. *Idem*.

Contracts in restraint of trade: Invalidity. The by-law of a co-operative company making it the duty of the company to pay its

CONTRACTS Continued

members the highest market price for farm products, but in case of sale to a competitor for a higher price such member shall pay a certain percentage of the price to the co-operative company is in restraint of competition and therefore illegal, and cannot be relied upon as the basis for affirmative relief. *Ludowese v. Farmers Co-op. Co.*, 197.

Personal services: Compensation: Burden of proof: Evidence. Ordinarily the law implies a promise to pay for services rendered, but if the servant renders the service as a member of the family of the other and receives support as a relative, the presumption is that such service was gratuitous, in the absence of any express or implied agreement to pay therefor; and the burden is upon the one performing the service under such circumstances to show a mutual expectation of compensation therefor. In the present case the evidence was insufficient to show any agreement or understanding that plaintiff, a son-in-law of defendant and whose family resided with the defendant, was to receive compensation for the services rendered, or to show a mutual expectation that plaintiff should receive compensation. *Farmer v. Underwood*, 587.

Parol evidence: Fraud, accident and mistake. Where fraud, accident or mistake is alleged respecting a written contract, parol evidence is admissible to prove the allegations; but if insufficient for that purpose the contract will stand and be enforceable according to its terms, regardless of such evidence. *Blumer v. Schmidt*, 682.

Parol evidence. Where an agreement of the parties is clearly embodied in a writing, mere contemporaneous parol agreements are not provable. Thus the written agreement for the sale of a physician's practice for a stated sum, to be paid by the application of a certain per cent of the purchaser's earnings, constituted a contract complete in itself; and was not rendered uncertain by the provision for payment when his earnings reached a stated sum. *Kinney v. Reed*, 337.

Same: Limitation of actions. Where a written contract was complete and definite in its terms, without the aid of oral evidence, the statute of limitations which bars actions upon oral contracts in five years has no application. *Idem*.

Same: Parol evidence: Variance. In this action upon a written contract to pay a stated sum for a physician's practice by payment of a certain percentage of defendant's earnings, an offer in evidence of an allegation of defendant's answer, as an admission

CONTRACTS Continued

TO

CONVEYANCES

that he had earned a certain sum, did not open the door to defendant for the admission of oral evidence tending to vary the writing. *Idem.*

CONSTITUTIONAL LAW. See EVIDENCE—STATUTES.

CONVERSION. See REAL PROPERTY.

CONVEYANCES. See ESTATES OF DECEDENTS.

Consideration: Specific performance. Where a board of county supervisors and a purchaser from the county of a lake bed both thought that the county had some interest therein, although the extent of the interest was admittedly doubtful, and both knew it was questionable if the purchaser could perfect title after conveyance by the county, a contract for a quit claim deed upon a valuable consideration was enforceable; and the county could not defeat specific performance even though it had no right or title to convey. *Sheffield v. Hancock County*, 561.

Consideration. A conveyance of land reciting a consideration in hand paid, and fully executed, cannot be set aside for want of consideration. *Lavelle v. Lavelle*, 99.

Confidential relation: Burden of proof: Undue influence. Where the evidence that a mother, though of advanced age but able to look after her own affairs, conveyed to her son the farm on which they lived, reserving the life use of part of the house, and he gave her back a life lease providing for a certain rental, he to pay all taxes, there was no such showing of a confidential relation between them as would shift the burden to the son of proving that the transaction was fair and free from fraud. Nor was there any such evidence of undue influence as would avoid the conveyance. *Idem.*

Mental incapacity: Fraud: Evidence. In this action to set aside a deed on the ground of mental incapacity, fraud and undue influence, the evidence is held insufficient to sustain the allegations of the petition. *Gingerich v. Miller*, 429.

Same: Consideration. Where a testator gave his widow the life use of the homestead, with the remainder to his sons by a former wife, a conveyance by the widow to the remaindermen was an election to take under the will, which was a sufficient consideration for the deed, she having at the time an actual life expectancy of several years. *Idem.*

CONVEYANCES Continued

TO

CRIMINAL LAW

Same: Conveyance of life estate: Fraud. A conveyance by the widow of the homestead, in which she was given a life estate, to the remaindermen in conformity with the provisions of the will was not a fraud upon her children by another marriage; their interests not being involved in a legal sense. *Idem.*

CRIMINAL LAW. See ASSAULT.

Adultery: Commencement of prosecution. Where the information charging a husband with adultery was signed and sworn to by the wife the prosecution was commenced on her complaint. Evidence held to support a finding that the wife knowingly signed the information in the instant case. *State v. Conklin*, 718.

Same: Evidence. Evidence held sufficient to connect defendant with commission of the crime of adultery and to take the issue to the jury. *Idem.*

Flight: Evidence: Instruction. Where the evidence simply showed that defendant when arrested was found in a shanty belonging to another at the place where he had formerly worked, and that the door was locked by the owner of the shanty, it was insufficient to warrant an instruction that if defendant fled and concealed himself such evidence of flight could be considered as prima facie evidence of consciousness of guilt. *State v. Manigan*, 434.

Murder: Premeditation: Evidence. Where defendant was charged with murder, which includes the element of premeditation, he was entitled to have any purpose for which he was carrying a deadly weapon, consistent with the absence of premeditation, considered by the jury. Thus in support of the claim that the shooting of deceased was accidental, and in response to evidence by the state that he had threatened to shoot deceased, and that he had carried his pistol during all of the day previous, and he had stated on cross-examination that he did not always carry his pistol, he should have been permitted to state why he was carrying it at the time in question. *State v. Manigan*, 434.

Murder: Variance. Under an indictment charging defendant with having killed deceased on a certain day, the jury was not at liberty to find that the crime was committed on another date within the statutory period. *State of Iowa v. Kelly*, 42.

Murder: Special finding: Presumption. Where the undisputed evidence showed that defendant killed deceased on a certain date, as charged in the indictment, it will be assumed from the affirma-

CRIMINAL LAW Continued

TO

DIVORCE

tive answer to a special interrogatory, as to whether defendant was insane at the time he shot and killed deceased, that the crime was committed on that date. *Idem.*

Murder: Special finding: General verdict: Conflict: New trial.

A general verdict of guilty and also an affirmative answer to a special interrogatory finding defendant insane on the day he shot and killed deceased, after the instruction of the court that the act was not excusable if defendant was able to control his acts although he might have been mentally unsound to some degree, presented such a doubtful finding regarding defendant's sanity at the time of the act as to require a new trial. *Idem.*

DAMAGES. See NEGLIGENCE—REAL PROPERTY.

Exemplary damages: Instruction. Exemplary damages are punitive in character and are not recoverable as a matter of legal right. The allowance of such damages depends upon a finding of actual damages and is a matter of discretion with the jury. In the instant case the instruction that the jury should allow plaintiff such punitive damages as it might believe just and right, instead of submitting such allowance to the jury's discretion, was erroneous. *White v. International Text Book Co.*, 693.

Same. An instruction authorizing recovery of exemplary damages should specify the conditions under which the jury may make the allowance. In an action for malicious prosecution an instruction authorizing recovery of such damages merely on proof of the implied malice necessary to make the prosecution wrongful was erroneous. *Idem.*

Instructions: Evidence. An instruction authorizing the jury to allow plaintiff damages for loss of time, if any, was not erroneous on the ground that there was no evidence of loss of time. *Idem.*

Personal injury: Measure of damages. The particular employment and salary received prior to the time of a personal injury may be considered on the question of damages, but the proper measure of damages is impaired ability to earn money generally. An instruction limiting the right of recovery to the loss of earnings from plaintiff's employment prior to the injury was erroneous. *O'Connell v. City of Davenport*, 95.

DEPENDENT CHILDREN. See MINORS.

DIVORCE. See MARRIAGE AND DIVORCE.

DOWER

TO

DRAINAGE

DOWER.

Purchase money mortgage. A widow is entitled to have her one-third interest in the estate of her deceased husband set apart to her free from a mortgage which was on the property when purchased and assumed by the husband, provided there is sufficient other property to pay the indebtedness. *Haynes v. Rolstin*, 180.

DRAINAGE.

Rights of landowner. While a landowner may drain into a natural water course or depression on his own land which will carry the surface water into a natural watercourse without liability for damages to others, he is not authorized to divert water in ponds on his own land away from its natural course, by cutting channels through a natural barrier and discharging it upon or close to the lower lands of an adjacent owner. Nor can he discharge surface water upon the land of another at a place different from its natural flow, or in materially increased quantities. *Kaufman v. Lenker*, 689.

Highways: Damages. The owner of a servient estate is bound to take the surface water naturally flowing thereon; and under the statutes providing for the drainage of highways the township authorities, if necessity requires, may construct culverts across the highway and dig ditches on either side thereof, and so long as they do not thus divert the water from its natural course they are within their rights in so doing; and although the water is thus collected in a more closely confined channel and discharged upon the servient estate, no damages will be implied from any resulting injury. *Hayes v. Oyer*, 697.

Watercourse: Acquiescence: Obstruction. Where the owner of a servient estate many years ago constructed a ditch across his land connecting with the system of drainage for the highway provided by the township authorities, thus conducting the water in the natural course of drainage across his land, and defendant maintained the same for a long series of years prior to the commencement of this action to restrain the obstruction of the highway ditches, such conduct amounted to acquiescence in the system of drainage thus established, and the same constituted a watercourse which defendant was not at liberty to obstruct. *Idem*.

Drainage easement: User. Where defendant and her grantors knowingly permitted the construction and maintenance of highway ditches, and for a long series of years maintained a ditch con-

DRAINAGE Continued

TO

EMINENT DOMAIN

necting therewith across her land, which was the servient estate, she could not deny the existence of an easement for the maintenance of the highway ditches which discharge the surface water upon her land, on the ground that an easement cannot be shown by proof of user alone. *Idem.*

Drainage system: Establishment by consent. Where the owners of both the dominant and servient estates unite in the construction of a drainage system, which is continued for more than the statutory period, the scheme becomes perpetual and cannot be changed without the consent of all parties interested. *Idem.*

DRUGGISTS. See INTOXICATING LIQUORS.

EASEMENTS. See DRAINAGE—HIGHWAYS—REAL PROPERTY.

ELECTIONS.

Death of candidate: Vacancy. When the death of a candidate for public office occurred so recently before the election that it was practically impossible to fill the vacancy, but he received a plurality of the votes without knowledge generally of the voters that he was deceased, the plurality vote cast for him will prevent the election of another candidate for the same office having a less number of votes; for although deceased was not a person in a legal sense the next highest candidate did not receive the greatest number of votes, within the meaning of the statutes. *Patten v. Haselton*, 645.

EMINENT DOMAIN.

Condemnation of property: Appeal: Notice: Service: Parties: Jurisdiction. The fact that notice of appeal from the award of a sheriff's jury in condemnation proceedings is required by the statute to be served upon the sheriff does not make him a party to the suit, nor prevent him from serving notice on the adverse parties; and where the notice of appeal, sufficient in substance, was addressed to the adverse party and also to the sheriff who accepted service for himself, and which was properly served in due time upon the adverse party, the court acquired jurisdiction. *Buckmiller v. Creston, Winterset & Des Moines Ry. Co.*, 502.

Notice of appeal: Service: Return: Amendment: Jurisdiction. It is the fact of service of notice of appeal and not the form of proof of service that confers jurisdiction; and although the return of a sheriff may show that without authority so to do he served

EMINENT DOMAIN Continued**to****EQUITY**

the same as sheriff, he may, after a motion to dismiss the action on that ground, amend his return to show that he served it as an individual, proving the service by affidavit, and thus give the court jurisdiction. *Idem.*

Notice of appeal: Parties: Prejudice. The fact that a sheriff, who conducts condemnation proceedings, was included and named in the notice of appeal as a defendant did not make him a party to the suit; nor will such fact alone disqualify him from serving the notice: and the defendant cannot complain that he was thus included rather than named in and served with a separate statutory notice, on the ground that it was prejudicial. *Idem.*

EQUITY.

Reformation of contracts: Jurisdiction. Equity will not reform a parol contract; it is only where it has been reduced to writing and the real agreement of the parties is not correctly expressed therein that equitable jurisdiction may be invoked for this purpose. Thus a suit upon a parol contract by a broker to make an exchange of lands will not be transferred to equity on the theory that it should be reformed. *Allgood v. Fahrney*, 540.

Same: Recovery of commission: Statute of frauds. Where a broker was authorized to procure one who was ready, able and willing to make an exchange for the land of his principal on terms acceptable to him, and such a person was procured with whom an oral contract of exchange was entered into, the broker is entitled to his commission, and his right thereto cannot be defeated by the subsequent refusal of his principal to proceed and reduce the contract to writing. *Idem.*

Same: Recovery of commission. Upon refusal of the owner to carry out his oral contract of exchange, a sale or exchange by the other party of his land will not affect the right of the broker to his commission; he is not bound to keep the other party in readiness at all times to make the exchange. *Idem.*

Specific performance: Tender: Sufficiency. In this action for specific performance plaintiff tendered a draft to the county auditor, which he refused, but upon request of plaintiff the auditor held the same until the meeting of the board, which was after the time for performance, when it was returned to plaintiff and he receipted for it. *Held*, that there was sufficient compliance with the contract to support the action. *Sheffield v. Hancock County*, 561.

ESTATES OF DECEDENTS

ESTATES OF DECEDENTS.

Administrators: Reports: Objections: Waiver of jury trial.

Where an administrator includes in his report his own personal liability to the estate, and submits to a trial of the issues tendered by the objections to the report without any demand for a jury or objection to a trial to the court, he will be deemed to have waived a jury trial. *McEwen v. Fletcher*, 517.

Debt due from administrator: Jurisdiction. When an administrator includes his own personal indebtedness to the estate in his report as a part of the assets of the estate, and asks that the amount he reports be fixed as his liability, the court has jurisdiction to determine the extent of his liability and charge it against him. *Idem.*

Assets of estate. Debts due from an administrator to the estate are assets of the estate from the time they become due, especially where he has mixed the funds of the estate with his own, or reports them as assets in his hands. *Idem.*

Trial to court: Effect of findings. Where issue is formed upon the report of an administrator and the objections thereto, and is tried to the court without objection, the findings of the court have the force and effect of a verdict of a jury. *Idem.*

Indebtedness of administrator: Liability of sureties. So far as the liability of sureties on an administrator's bond is concerned, the indebtedness of the administrator to the estate should not be regarded as an asset as of the time of its maturity, if at that time and at all subsequent times he was in fact insolvent, and did not or could not pay the same. *Idem.*

Indebtedness of administrator: Assets. The administrator inventoried a demand debt due from himself to the estate as a deposit in his own bank. He made no report for more than a year and then only upon order of court, in which he showed money in his bank and a personal indebtedness, but no report was ever approved. It also appeared that his bank was a going concern for more than a year after his appointment, that he kept no separate account with the estate, and there was no evidence of his insolvency until after expiration of the year for settlement of the estate. *Held*, his debt was properly charged against him by the court as an asset of the estate, because of his greater obligation to pay that debt, as he was bound to do so as long as he was solvent. *Idem.*

ESTATES OF DECEDENTS Continued

Claims: Allowance: Evidence. In this proceeding to establish a claim against an estate the evidence while in conflict, is held to be sufficient to support the order of the trial court allowing the same. *Beatty v. Snouffer*, 746.

Evidence: Transactions with a decedent. Where it appeared that decedent came into possession of funds belonging to claimant in his absence and through another, the testimony of claimant as to the amount received by decedent was not objectionable under section 4604 Code. *Idem*.

Claims: Interest. A claim once allowed with the approval of the administrator should draw legal interest from that date, even though the allowance was set aside at the instance of an interested party and afterward re-established. *Idem*.

Conveyance of real property by executors. Where the testator's will authorized the executors when duly qualified to convey real property, and after probate of the will and qualification they made a deed to the property and received the consideration therefor, the title thus conveyed was not affected by an unauthorized, void or voidable contract to convey the property to the same grantee, made before their appointment; especially where there was no objection made by one having a right to complain and no suggestion of fraud or that the land was not sold at its fair value. *Hunter v. Amish*, 397.

Homestead: Occupancy by widow: Payment of rent. Upon the death of the husband the wife may continue to occupy the homestead until it is otherwise disposed of by law, and she is not required to pay rent during the time thus occupied and prior to an election to take a distributive share in the estate. *In re Estate of Baker*, 305.

Order of distribution: Fraud: Evidence. A judgment may be set aside on the ground of fraud, but in such cases the fraud and deceit practiced must have prevented the unsuccessful party from having a fair trial. Thus where one claiming to be an heir of decedent, though in fact there was no relationship, made application for distribution to him of a share in decedent's estate and the widow, who was guardian of the other children, had full knowledge of applicant's relation to the estate and of the grounds on which he claimed an interest therein, and was in no manner circumvented or prevented from urging applicant's want of relationship to defeat his right, no such showing of fraud was made as would authorize a vacation of the order of distribution. *Aschen v. McDermott*, 750.

ESTOPPEL

TO

EVIDENCE

ESTOPPEL. See LIMITATION OF ACTIONS—REAL PROPERTY.

Pleadings. To be available the facts constituting an estoppel must be pleaded. *Kamrar v. Butler*, 293.

EVIDENCE. See MARRIAGE AND DIVORCE—NEGLIGENCE—NEGOTIABLE INSTRUMENTS—PARTNERSHIP—REAL PROPERTY—WILLS.

Cross-examination of witnesses. The scope of the cross-examination of a witness is largely a matter of discretion, and the court's ruling will not be disturbed on appeal, in the absence of prejudice. Thus overruling the objection to the mere inquiry as to whether the witness ever heard anything said on a certain subject, objected to as improper cross-examination, was without prejudice; and when a question objected to on that ground was not answered, though the objection was overruled, and on other grounds the party moved to strike the answer elicited by the court, no error appeared. In the instant case the direct examination was broad, and no abuse of discretion in the cross-examination is shown. *Taylor v. Wildman*, 252.

Corroborative evidence: Statements of party. Where a party upon the eve of trial amends his pleading, thus injecting a new demand into the case, and the other party offers evidence tending to discredit the same as an after thought, manufactured for the purpose of the case, it is permissible for the party making the demand to show that he made a similar claim about the time of the transaction involved, and that he advised his attorneys of the same at the time he laid his case before them. *Spaulding v. Laybourn*, 277.

Examination of witnesses: Discretion. Whether a party may abandon the cross-examination of a witness of the opposing party and proceed to examine him as his own witness is a matter wholly discretionary with the court. *Reeves & Co. v. Younglove*, 151.

Examination of witnesses: Leading questions. Where a defendant seeks to negative evidence of the state by testimony directly responsive thereto, counsel may direct the attention of the witness to the very statements proposed to be negatived, and the examination will not be considered as leading and suggestive. *State v. Manigan*, 434.

Examination of witnesses. Where no attempt is made to impeach a witness, it is not proper in the examination of another witness to put into his mouth the answer sought, concerning what the

EVIDENCE Continued

former said as a witness in another proceeding relating to the same matter. *Withey v. The Fowler Co.*, 377.

Scope of cross-examination. Where one who witnessed the collision of a truck with an automobile had described the movements of each and stated that he anticipated the collision, it was not prejudicial to ask him on cross-examination if he anticipated that the driver of the truck would turn sharply across the traveled way without looking to see if any one was approaching, although the anticipations of the witness were not material and might well have been omitted. *Idem.*

Expert opinion. The distance in which a loaded truck could be stopped when hauled along a substantially level paved street is a matter concerning which an experienced driver may give his opinion in evidence. In the instant case the evidence is held to show that the street at the point where the truck struck the automobile, causing plaintiff's injury, was practically level. *Idem.*

Exclusion: Prejudice. The rejection of evidence is not prejudicial error, where immediately afterward the witness without objection testified to the matter previously inquired about. *Brandeis v. Chicago, Burlington & Quincy Ry. Co.*, 702.

Exclusion of evidence: Review of ruling. A ruling excluding evidence will not be reviewed on appeal, where there is nothing in the record disclosing the nature of the excluded evidence. *Kinney v. Reed*, 337.

Foreign laws and usages: Evidence: Conclusion. The unwritten law of another state and the usage and practice under its written law may be proven by the evidence of attorneys practicing in that state; but the opinion of attorneys engaged in practice in a foreign state that an abstract of title to land in that state was not merchantable was incompetent, because a mere conclusion. *Billick v. Davenport*, 105.

Foreign laws: Proof: Presumption. To render a printed copy of the statutes of another state admissible in evidence to prove the law of that state, the same must of itself purport to be published under the authority of the foreign state, or there must be other competent proof that the book was commonly admitted as evidence of the statute law by the courts of that state, as required by the statute of this state; and in the absence of competent proof of the law of a foreign state it will be presumed to be the same as that of this state. *Hardware Co. v. Price*, 353.

EVIDENCE Continued

Evidence not responsive: Right to object. Where the answer of a witness is competent, relevant and material to the issue, the objection that it is not responsive to the inquiry can only be raised by the party propounding the question. *Philpott v. Jones*, 730.

Hypothetical questions. It is necessary that the record contain some evidence of the facts assumed in a hypothetical question, but they need not be established by the testimony; and only the substance of the testimony need be stated in the question. Nor is it necessary that every fact concerning which evidence has been offered be included in the question, where the omitted facts were brought to the attention of the witness and jury by the examination of the witness. *Philpott v. Jones*, 730.

Leading questions. Where the cross-examination of plaintiff, suing for injuries received while riding in an automobile, suggested or assumed that she was riding under some arrangement or agreement with the other occupants of the car, it was proper for her to state on redirect examination how it was she happened to go riding at that time, and who asked her; as the inquiry was material on the question of whether she was a guest, or the owner or driver of the car. *Withey v. The Fowler Co.*, 377.

Leading questions: Discretion: Evidence. To justify the reversal of a cause because of the overruling of objections to leading questions there must be a clear abuse of the court's discretion in so doing and an apparent prejudice of the rights of the parties. In the instant case no prejudice appears. *Idem*.

Market value: Competency of witness. A farmer who has occasion to purchase and sell cattle to some extent, and who accompanied a cattle buyer in a joint effort to purchase cattle at the lowest possible price, though engaged chiefly in raising grain, was competent to testify to the market value of cattle in the community in which he lived. *Hanson v. Western Union Tel. Co.*, 639.

Same. A stock buyer who had visited the vicinity many times and purchased many cattle, and at the time in question sought to purchase cattle from numerous farmers in the locality, was also competent to testify to their market value at that time and place, although he did not reside in that community. *Idem*.

Mental incapacity: Qualification of witness. A non-expert witness must not only first detail the fact and circumstances upon which his opinion of mental unsoundness rests, before he is permitted to give his opinion on that subject, but these facts must justify his

EVIDENCE Continued**TO****FENCES**

conclusion to give it weight. The facts and circumstances detailed are held insufficient to qualify the witness to say that the party inquired about was incompetent. *Caltrider v. Sharon*, 287.

Production of books and papers: Sufficiency of application. The application for an order requiring the production of books and papers for the inspection by the opposite party must disclose the fact that the desired evidence is material to some issue in the case; but this requirement may be satisfied by a detailed statement of what is expected to be proved, although there is no direct averment of materiality. *Dalton v. District Court*, 187.

Production of evidence: Discretion. Although the answer in an action for libel, and the objections to an application for the production of defendant's books showing the circulation of the alleged libel, admitted the extent of the circulation of the newspaper as broadly as charged in the petition, it was still within the proper discretion of the court to require the production of the books. *Idem*.

Constitutional law: Unreasonable search and seizure. An order for the production of books and papers is not a violation of the constitution prohibiting an unreasonable search and seizure. *Idem*.

Production of books and papers: Discretion. The right to a rule requiring the production of books and papers is not to be used as a means of acquiring knowledge of a competitor's business, which will afford an unjust advantage; but in granting the rule it will be presumed that the court in the exercise of its discretion will permit no examination or discovery not required for the purposes of the case, and that the rights of both litigants will be safeguarded. *Idem*.

Transactions with a decedent. A widow claiming that her husband assigned a lease to her prior to his death covering part of his property is competent to testify to the genuineness of his signature and to her possession of the instrument before his death. Evidence held sufficient to show an assignment of the lease in question. *In re Estate of Baker*, 305.

FEDERAL SAFETY APPLIANCE ACT. See **RAILROADS**.

FENCES.

Partition fences: Assessment of cost: Jurisdiction of fence viewers.
Fence viewers act judicially with respect to their several duties,

FENCES Continued**TO****GARNISHMENT**

and when acting within their jurisdiction their finding is final unless appealed from. Notice, however, to the adverse party is essential to their jurisdiction, whether the proposed act is to appportion a partition fence, or to appraise the value or cost of such fence, and without such notice, whether prescribed by statute or not, their proceedings are void for want of jurisdiction. *Pickerell v. Davis*, 576.

Same: Notice: Jurisdiction. The statutory powers of fence viewers embrace distinct actions which may be taken at different times and for different purposes, but notice of the proposed action is always essential that the party whose rights are affected may be heard. Where several matters can all be accomplished at one meeting they may all be included in one notice, but the notice must embrace all subjects upon which it is proposed to act. In the present case the value of the fence was assessed without notice to defendant, and subsequently he was notified of the assessment and directed to pay the cost within the statutory time. *Held*, that the assessment was void, and that the subsequent notice given did not relate back to the time of assessment, so as to sustain the jurisdiction of the viewers to make the appraisalment. *Idem*.

FIXTURES. See **REAL PROPERTY**.

FOREIGN LAWS. See **EVIDENCE**.

FRAUD. See **COMPROMISE AND SETTLEMENT—CONVEYANCES—SURETY SHIP**.

Settlement for personal injury. The mere expression of an erroneous opinion concerning the recovery of one injured, if honestly made, will not authorize the setting aside of a settlement for the injury; but if coupled with statements of fact concerning the nature and character of the injury which were not true, but having a direct bearing upon the extent of liability and likely to induce a belief in speedy recovery, will constitute ground for setting aside the settlement and release. *Haigh v. Laundry Co.*, 143.

Same. The positive assertion of a fact as true when made for the purpose of gaining an advantage, which is in good faith relied on and acted upon as true, is as binding upon the party making the statement as though he knew it to be untrue, and he will not be heard to say that he did not know that it was false at the time he made it. *Idem*.

GARNISHMENT. See **ATTACHMENT**.

GIFTS

GIFTS.

Charitable gifts: Validity. Gifts to charitable purposes will be upheld when consistent with law; and to this end the rules of law will be liberally applied, thus often sustaining a charitable bequest where a private trust would fail. *Wilson v. First Nat'l Bank of Independence*, 402.

Same: Indefiniteness. A charitable gift is not void for indefiniteness, where those benefited are designated in a general way, but leaving the application of the gift to be made by the trustee. *Idem.*

Same: Establishment of schools. Gifts for the establishment of schools for the mental or moral improvement of the people, especially for the poor, are lawful public charities. *Idem.*

Same: Definiteness. A gift for the establishment of an industrial training school for children and a library building to be used by the people of a certain town, naming trustees to administer the gift until a corporation was organized for that purpose, and providing for the construction of a school building and that the school should be open to all persons fitted for the training offered, regardless of sex, race or color, was not invalid on the ground of indefiniteness; as it is sufficient if the general nature and purpose of the gift is expressed, or reasonably ascertainable from the instrument, leaving the practical working out of the object sought to the trustees. *Idem.*

Same: Perpetuities: Application of statute: Charities. Gifts to charitable uses are not prohibited by the statute against perpetuities; and a gift for the establishment of a training school for children and for a public library is for a charitable purpose and is not in violation of the statute, although not limited to the use of the poor and needy; as the term charity includes any scheme for the betterment of society, and includes any gift consistent with law tending to promote science, education or enlightenment or the public convenience. *Idem.*

Same: Perpetuities: Statute. A bequest of bank stock for a charitable purpose, subject to the payment of dividends thereon to relatives of the testator during their natural lives, and upon their death the stock to be turned over to the charity, was not invalid as against the statute of perpetuities on the ground that it was a gift over after the lapse of another gift. *Idem.*

GIFTS Continued

TO

HIGHWAYS

Same. Where a testator bound the trustees of a charitable bequest by contract to organize a corporation within a year after his death to take over the bequest, and he reaffirmed the same in his will, the gift was not in violation of the statute against perpetuities in that it failed to limit the time for organization of the corporation. *Idem.*

Same. Where the testator secured the erection of a building for school purposes during his lifetime, and by his will created a fund for its support, which was not available until after the death of relatives to whom he gave the income for life, those appointed to manage the trust were not chargeable with negligence or laches, because failing to anticipate the receipt of the fund and to attempt to conduct the school without means. *Idem.*

GUARANTY. See SURETYSHIP.

GUARDIANSHIP.

Distribution of funds: Notice to minors: Guardian ad litem. In the distribution of funds derived from the sale of a decedent's real property and in the hands of a guardian, the duly appointed guardian of minors represents them, and it is not necessary that notice of the application of distribution shall be served on the minors, or that a guardian ad litem be appointed, unless the action of the regular guardian is in its nature adverse to them. *Aschan v. McDermott*, 750.

Mental incapacity: Evidence. To authorize the appointment of a guardian for the property of an alleged incompetent, the evidence must disclose such unsoundness of mind as to render the party mentally unfit and incompetent to look after and manage his own affairs. Evidence held insufficient to authorize the appointment. *Caltrider v. Sharon*, 287.

Removal of guardian: Discretion. The removal of a guardian is a matter addressed to the discretion of the court which hears the application and the evidence, and the order entered will not be reversed on appeal unless an abuse of such discretion is shown. *In re Guardianship of Runnels*, 659.

HIGHWAYS. See DRAINAGE.

Filing of village plat: Effect. The filing of a plat and dedication of a highway in an unincorporated village creates simply an easement, or right to use the highway for public purposes. The title to the

HIGHWAYS Continued

TO

INSTRUCTIONS

highway remains in the original owner charged with the easement, and when vacated the unincumbered possession of the same reverts to him. Thus where two tracts of land were platted, taking four feet from one and fifty-six feet from the other, which was dedicated as a highway, and thereafter the owner conveyed the tract from which the fifty-six feet were taken, and his grantee conveyed by quitclaim all his interest in the lots and streets in the plat, upon vacation of the street the entire beneficial ownership of that part of the street taken from the tract conveyed vested in the owner at the time of its vacation. *Kitzman v. Greenhalgh*, 166.

HOMESTEAD. See **ESTATES OF DECEDENTS—REAL PROPERTY.**

INFANTS. See **NEGLIGENCE.**

Contracts of infants: Necessities: Attorney's services: Settlement of suit. Assuming that the contract of a minor for legal services is a contract for necessities, within the meaning of the statute, the character of the obligation is not affected by the fact that the attorney also acts as agent in a settlement of the controversy. Thus the settlement of a suit for seduction, which was ratified both by the minor and her father as next friend, was a contract for necessities by which the minor was bound. *Hickman v. McDonald*, 50.

Same: Attorney's services: Reasonable value. Although a minor, as an abstract proposition, may only be liable for the reasonable value of an attorney's services, that fact will not relieve against a contract liability therefor, where the evidence shows that the reasonable value and the contract amount are the same. *Idem.*

INJUNCTION. See **INTOXICATING LIQUORS.**

INSTRUCTIONS. See **ASSAULT — DAMAGES — NEGLIGENCE — REAL PROPERTY.**

Assumption of facts. In an action upon a contract for recovery of a broker's commission, in which evidence was admitted tending to establish a contract different from that alleged in the petition, an instruction that there was no issue as to any other contract and it was wholly immaterial as to what other contract was made, except as it may be material in determining whether the contract relied upon was made, was not objectionable as assuming the making of a contract other than the one pleaded and relied upon. *Taylor v. Wildman*, 252.

INSTRUCTIONS Continued TO INTOXICATING LIQUORS

Refusal of requests. It is not error to refuse to give instructions which are sufficiently covered by those given by the court; nor to refuse to give those stating mere abstract legal propositions, without suggesting their proper application to the case. *Withey v. The Fowler Co.*, 377.

Same. Where the court gave a requested instruction sufficiently covering the point, refusal to incumber the instructions by repetitions of the same thought in different form was not erroneous. *Idem.*

Submission of issues. Where there is evidence in support of a claim, though contradicted, the issue is for the jury. *Spaulding v. Laybourn*, 277.

INTERSTATE COMMERCE. See INTOXICATING LIQUORS.

Power to regulate. The power to regulate interstate commerce is delegated by the constitution exclusively to congress; it cannot be exercised by the states. *State of Iowa v. United States Express Co.*, 112.

Regulation of liquor traffic. The manufacture, sale and transportation of liquor is subject to the police power inherent in the state, and may be regulated by the legislature in such reasonable manner as it may think best for the welfare of its citizens; and congress has power to prohibit the shipment of liquor into a state having a prohibitory law, thus taking it out of the sphere of interstate commerce when within such state, and thereby supplementing the state law. *Idem.*

INTERVENTION. See ACTIONS.**INTOXICATING LIQUORS.**

Interstate shipment: Nuisance: Injunction: Express companies. In view of what is known as the Webb-Kenyon Act of Congress, prohibiting the interstate shipment of intoxicating liquors intended by any person to be received, sold or used in violation of the law of the state to which shipped, a suit in equity will lie to enjoin an express company from transporting, delivering and distributing an interstate shipment of intoxicating liquors in a certain county, contrary to the statutes of this state. *State of Iowa v. United States Express Co.*, 112.

Sale by druggist: Requests: Attestation. The statute requires that a registered pharmacist before selling or delivering any intox-

INTOXICATING LIQUORS

TO

JUDGMENTS

icating liquors shall take a written request therefor, which shall be attested by him; and omission to attest such request will render the sale illegal and the business may be enjoined as a nuisance, regardless of the question of good faith. *McCallister v. Campbell*, 322.

INSURANCE.

Accident insurance: Evidence of accidental death. To satisfy the provision of an accidental insurance policy, that the association should not be liable for an injury or death caused by the discharge of a firearm, unless the accidental character thereof be established by the testimony of one eye witness other than the insured, it is not necessary that the witness should have seen the exact manner of the discharge of the firearm, but does comprehend the presence of the witness at or near the scene, and his direct observation of the facts and circumstances which of themselves indicate that the shooting was accidental, without the aid of any presumption arising from the instinct of self-preservation. Evidence held insufficient to establish the accidental shooting of deceased. *Roeh v. Business Men's Protective Ass'n*, 199.

Same: Contracts: Public policy. The foregoing provision in the contract of insurance was not so repugnant to public policy, in that it attempts to modify or control the procedure of the courts, as to render the same invalid. *Idem*.

JUDGMENTS. See MARRIAGE AND DIVORCE.

The judgments of a Federal Court constitute liens upon real estate located in the county where the court is held, and an abstract failing to contain a certificate showing that there were no judgments of that court affecting the title was not merchantable. *Billick v. Davenport*, 105.

Error in computation on former appeal: Effect. A mere typographical error in computation, manifest on the face of the figures, and appearing in the opinion of the appellate court, is not binding upon the trial court in further proceedings after reversal. *Kinhead v. Peet*, 65.

Lost records: Parol proof. Conceding that a prior adjudication may be proven by parol, where the record has been lost or is not available, to render such testimony competent it must appear in some legitimate manner that there was such a proceeding at some time and before some court, in which the question involved was considered if not adjudicated. *Hays v. Claypool*, 297.

JUDGMENTS Continued TO LIMITATION OF ACTIONS

Quieting title: Homestead. An action to quiet title against the lien of a judgment will lie, although the property involved is the homestead of plaintiff, against which the judgment could not be enforced. *French v. Bartel & Miller*, 677.

Quit claim deed: Effect. The execution of a quit claim deed to relieve a homestead of the apparent lien of a judgment does not involve the surrender of any future right to levy upon the property in case its homestead character is lost; its only effect would be to make apparent the fact that the plaintiff's homestead right antedated the judgment and the indebtedness upon which it was founded, thus rendering the property exempt from execution. *Idem.*

Record evidence. The entries required to be kept by the clerk of courts in a book called the combination docket are not sufficient to establish the rendition of a judgment; the record of the judgment itself is the best evidence and is alone admissible to prove the judgment, in the absence of any ground for the introduction of secondary evidence. *Hardware Co. v. Price*, 353.

When conclusive. Where the court has jurisdiction of the subject matter and of the parties at the time of entering an order, the order is final and binding upon all the parties; and any attempt of the judge in vacation to set the order aside would be of no effect. *Aschan v. McDermott*, 750.

Same. While in a technical sense an order for distribution of the funds of an estate is not a judgment, it is a final adjudication of the rights of parties, and is conclusive unless appealed from or set aside in some direct proceeding. *Idem.*

JURISDICTION. See EMINENT DOMAIN—ESTATES OF DECEDENTS—FENCES.

LACHES. See LIMITATION OF ACTIONS—PAYMENT.

LAKE BEDS. See WATERS.

LIENS. See ATTORNEYS.

LIMITATION OF ACTIONS. See CONTRACTS.

Laches: Estoppel. The statute of limitations cannot be urged against the state, but where it seeks to establish rights by an action to quiet title, relief may be denied on the ground of laches and estoppel. *State of Iowa v. Livingston*, 31.

LIMITATION OF ACTIONS

TO

MARRIAGE AND DIVORCE

Public officers: Fees. An action upon the official bond of a justice of the peace to recover fees retained by him in excess of the lawful amount is barred after three years, under the statute prescribing a three-year limitation upon actions against public officers of that character. *Polk County v. Roe*, 302.

MALICE. See ATTACHMENT.

MALICIOUS PROSECUTION.

Wrongful attachment: Instructions. Where plaintiff in an attachment alleged that defendant was about to dispose of his property with intent to defraud his creditors, and defendant pleaded as a counterclaim that the attachment was malicious and without reasonable cause, an instruction that if plaintiff submitted the facts concerning the financial standing of defendant to its attorney and was advised that it had sufficient cause for attachment, then exemplary damages should not be allowed, was erroneous; as the issuance of the attachment was not dependent upon defendant's financial condition, but upon whether he was about to dispose of his property with intent to defraud his creditors. *Second Nat'l Bank of New Hampton v. Lanin*, 512.

Damages: Expenses. Where defendant in attachment seeks to recover attorney's fees expended in procuring a release of the attachment he should show the necessity for an attorney's services and the value of the same. *Idem*.

MARRIAGE AND DIVORCE.

Marriage: Consanguinity: Validity. A marriage between first cousins solemnized in violation of a statute prohibiting such marriages is void; and a common law marriage between cousins unless consummated prior to the passage of such a statute is also void. In re estate of Wittick, 485.

Transactions with a decedent. In an action to establish the rights of claimant in a decedent's estate by virtue of an alleged common law marriage, evidence that claimant was expecting to marry decedent until she discovered that he was addicted to the use of liquor, when she declined unless he should reform, but that after some time and an apparent reformation she consented, was inadmissible under the statute prohibiting conversations with a decedent, except so far as it tended to show claimant's intent and the circumstances under which their relations began. *Idem*.

MARRIAGE AND DIVORCE Continued

Same. Evidence of claimant, seeking to establish a right in the estate of decedent under a common law marriage, that from the time she had agreed to marry decedent she considered herself as his wife, and that the formal ceremony should be performed when they could go to the proper church, was admissible on the question of her intent, and is not prohibited as a communication with decedent. *Idem.*

Same. Evidence showing the relation of parties after the passage of a law prohibiting their marriage because of consanguinity is admissible, not to show a common law marriage after that date but as explaining the relation of the parties prior to the passage of the law. *Idem.*

Common law marriage: Evidence. A mutual agreement to presently become husband and wife, followed by cohabitation as such, constitutes a valid common law marriage of parties not legally disqualified from marrying; and if the relations prior to the passage of a disqualifying statute were such as to constitute a valid common law marriage, neither the enactment of the statute nor a subsequent invalid marriage ceremony would affect the previous marriage by agreement. In the present case the evidence is held to show a valid common law marriage between first cousins prior to the passage of the statute prohibiting such marriages. *Idem.*

Divorce: Cruel and inhuman treatment: Evidence. In this action for divorce on the ground of cruel and inhuman treatment the evidence of defendant's misconduct toward, and ill treatment of plaintiff, was not sufficient to show that her life was imperiled within the contemplation of the statute. *Kinkade v. Kinkade*, 56.

Same: Vacation of judgment for fraud. The court has power to correct its own records during the term, and to modify, set aside or expunge an order or decree theretofore entered at the same term; and where a decree of divorce was procured by fraud or perjury the court, upon its own motion and upon due notice to all parties interested, had power to reopen the case and set aside the decree; and the fact that the information came from a stranger to the suit was immaterial, as the court acted upon its own motion. *Todhunter v. De Graff*, Judge, 567.

Same: Vacation of decree: Notice. Where notice of divorce proceedings was served upon a non-resident defendant by publication, for whom no appearance was made, it was the duty of the court to protect itself and the rights of the defendant against the fraud or perjury of the plaintiff; and no notice to defendant was required

MARRIAGE AND DIVORCE Continued **TO** **MECHANICS' LIENS**
of a hearing to determine whether the decree was procured by fraud. *Idem.*

Same. Where it did not appear that plaintiff in divorce proceedings had married another after divorce from her former husband, but it did appear that both before and after the decree she had illicitly cohabited with another, such other party was not entitled to notice of the proceedings instituted to determine whether the decree of divorce was obtained by fraud; since, as it appeared that their cohabitation was meretricious, there was no legal presumption of marriage. *Idem.*

Divorce: Inhuman treatment: Adultery: Evidence. In this action for divorce on the ground of cruel and inhuman treatment and of adultery on the part of the wife, the evidence is reviewed and held sufficient to support both charges and to entitle the husband to a decree. *Leupold v. Leupold*, 595.

Same: Adultery. The fact that adultery is a crime usually committed in secrecy and therefore difficult of direct proof will not preclude a conclusion of guilt, when the facts and circumstances relied upon are consistent with such conclusion and inconsistent with the idea of innocence. *Idem.*

Same: Decree. The decree awarding to each of the parties the property held by them in their own right, without alimony, and the care of the minor child to the mother for part of the time provided she conducts herself properly, with an allowance for the support of the child while in her care, is held to be equitable. *Idem.*

MASTER AND SERVANT. See **NEGLIGENCE.**

MECHANICS' LIENS.

Contract by agent: Rights of parties. Where a contract was made by the husband for the construction of a building upon land belonging to the wife, but she approved of the same and knew of the progress of the work and of the claims of the materialmen, so far as her rights and those of the materialmen were concerned the contract was of the same force as though made by her. *Wheeler Lumber, etc., Co. v. White*, 495.

Time for filing notice: Evidence. In this action to establish a mechanics lien the evidence is held to show that the last item of the account was actually delivered on the date of the charge, and

MECHANICS' LIENS

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that the time for filing notice of the lien began to run from that date. *Idem.*

Rights of subcontractors. Ordinarily subcontractors can only claim a lien upon the funds in the hands of the owner of the building and the principal contractor, but where the owner paid material-men whose liens had not been filed, with knowledge of the claims of subcontractors, he was liable for such claims thereafter filed in time. *Idem.*

Performance of contract: Evidence. In this action to establish subcontractors' liens the evidence is held to show a substantial compliance by the original contractor with his contract. *Idem.*

MINORS. See NEGLIGENCE.

Dependent children of widow: Support: Statutes. A widow is one whose husband is dead and who has not remarried, and not one who has been divorced, within the meaning of the act of the 35th General Assembly, providing that if a mother of dependent children is a widow and is unable to properly care for them the court may fix the amount necessary for that purpose to be paid by the county. *Debrot v. Marion County*, 208.

Same: Liability of parents for support of children. The common law liability of either or both parents to support their minor children exists, and is not affected by their divorce. *Idem.*

MINES AND MINING.

Negligence: Instructions: Refusal of request. Where the court instructed that plaintiff could recover only in case the jury found that it was defendant's duty to inspect the roof of the mine where decedent was at work, and failed to perform such duty, and that if it was decedent's duty to make such inspection, or if the roof was subject to change brought about by decedent or the other workmen, and its dangerous condition thus resulted he could not recover, there was no occasion for giving a requested instruction that the burden was upon plaintiff to show that the falling of slate from the roof which caused decedent's death was one of the dangers incident to his employment. *Carnego v. Crescent Coal Co.*, 552.

MISCONDUCT. See NEW TRIAL.

MOTOR VEHICLES. See MUNICIPAL CORPORATIONS.

MORTGAGES

TO

MUNICIPAL CORPORATIONS

MORTGAGES.

See DOWER.

Bona fide purchaser: Burden of proof: Evidence. Where a mortgage had its inception in fraud the burden is upon the holder to show that he took it in good faith, for a valuable consideration, before maturity and without notice of the fraud. *Robertson v. U. S. Live Stock Co.*, 230.

Same. Lack of knowledge on the part of a bank and of the officers of the bank, that a mortgage held by it was obtained by fraud, may be established by the direct testimony of all the officers who might or could know, or by facts and circumstances from which the inference of want of knowledge must necessarily be drawn. *Idem.*

Same: Assignment of mortgage: Bona fide holder: Consideration. The assignment of a note carries with it a mortgage given to secure the same, and the right to foreclose the mortgage; and a bona fide purchaser without notice takes the mortgage relieved of any infirmities in its inception; and extension of the time of payment of the mortgage is a valuable consideration. *Idem.*

Assignment to bank: Fraud: Notice: Evidence. It is not necessary under all circumstances that all the officers of a bank be called as witnesses to establish the fact that the corporation had no notice of the fraud entering into the making of a mortgage held by it as assignee. Where the managing officers of the bank and those who had charge of the particular transaction testified that they had no knowledge of the fraud and acted in good faith, knowledge of the bank through any other officers may be negatived by facts and circumstances affirmatively showing that it could not have had notice through any such source. Knowledge of the fraud is not shown in the instant case. *Idem.*

MUNICIPAL CORPORATIONS. See CONSTITUTIONAL LAW.

Defective streets: Negligence. A city is not liable merely because of defects or obstructions in its streets made reasonably necessary by the work of improving the same. *Asher v. City of Council Bluffs*, 661.

Same: Negligence: Evidence: Submission of issues. It is the duty of a city to maintain a portion of the street at the side, while the center was torn up for the purpose of laying street railway tracks, in as safe a condition for travel as was consistent with the work of improvement. In the instant case the evidence is held to warrant submission of defendant's negligence in permitting holes in the

MUNICIPAL CORPORATIONS Continued

surface of the traveled portion of the street, into which plaintiff's horse stepped, causing her to be thrown from the buggy and injured, and also to warrant submission of plaintiff's contributory negligence. *Idem.*

Defective streets: Personal injury: Proximate cause. Plaintiff was injured by being thrown from his motorcycle upon striking some obstruction in the street pavement, and the evidence is held sufficient to require submission of the question of proximate cause, and to sustain a finding that a pipe protruding from the pavement was the proximate cause of plaintiff's injury. *Waterhouse v. City of Waterloo*, 324.

Defective streets: Negligence: Evidence. In this action for personal injury caused by an alleged defective street, evidence that the carriage in which plaintiff was riding tipped over when the wheels were driven into a ditch in the middle of the street, was sufficient to take the issue of negligence on the part of the city in permitting the existence of the ditch to the jury. *Fountain v. City of Des Moines*, 316.

Same: Contributory negligence: Evidence. The mere fact that the driver of a carriage knew of a ditch in the middle of the street, into which he drove the wheels of the carriage when it was dark, causing the carriage to overturn and injure plaintiff, will not establish contributory negligence as a matter of law. The question of the contributory negligence of plaintiff's husband in thus driving into the ditch was properly submitted to the jury. *Idem.*

Defective walks: Negligence: Evidence. In this action for personal injury caused by a defect in a sidewalk, the evidence is reviewed and held to require submission of the issues of negligence of the defendant city, and of contributory negligence on the part of plaintiff. *Overton v. City of Waterloo*, 332.

Same: Care required: Instruction. A pedestrian without knowledge of defects in a sidewalk may assume that the city has exercised ordinary care to keep its walks in reasonably safe condition: but he is bound to use ordinary care for his own safety, and may not assume that he can use the walk with no care on his part. *Idem.*

Same: Contributory negligence. Where the attention of a pedestrian while walking along the sidewalk was attracted by the display of goods in the store windows, and while thus engaged she stepped in a hole in the walk which she had not noticed, fell and was injured, she was not guilty of contributory negligence as a matter of law.

MUNICIPAL CORPORATIONS Continued

Repair of streets: Negligence: Instruction. A city has the right to repair its streets, and in doing so may tear up a defective pavement and obstruct the street, if necessary, without liability in consequential damages resulting therefrom, when the work is performed with ordinary skill and prudence; and persons using a street when undergoing repairs are held to such a degree of care as an ordinarily prudent person would exercise under the same conditions. The requested instruction on the subject should have been given in the instant case. *O'Connell v. City of Davenport*, 95.

Regulation of motor vehicles: Use of lights. A city ordinance substantially in accord with the statute, requiring that all motor vehicles operated or driven after dark shall display two lighted lamps in front and one in the rear, is not violated by temporarily leaving an automobile standing unoccupied at the side of a street after dark without such lights. *City of Harlan v. Kraschel*, 667.

Special assessments: Remedy of property owner. Objection before the city council and appeal to the courts is the exclusive remedy of a property owner who is aggrieved by any error or irregularity in the notices or proceedings leading to a special assessment of his property for an authorized public improvement, and in failing to do so his objections are waived; and in no such case can an independent action in equity be maintained to set aside a special assessment, without a showing of fraud. *Durst v. City of Des Moines*, 82.

Same: Valuation of property: Jurisdiction. The erroneous valuation of property by the city council does not deprive it of jurisdiction to levy a special assessment against it for a public improvement; as this is not a jurisdictional question, but one for determination by the council, and any error of the council in fixing a valuation may be reviewed on appeal, proper objection having been made. *Idem*.

Same: Limitation of assessment: Single improvement. The statute provides that no assessment for a public improvement shall exceed twenty-five per cent of the value of the property; but this applies in the case of each distinct improvement without reference to other burdens which the property may have been compelled to bear for other improvements. Thus where property abuts upon two different streets which are improved at different times, each separate improvement may operate to create like special benefits, and will not be treated as a single improvement within the statute limiting the imposition of special assessments. *Idem*.

MUNICIPAL CORPORATIONS Continued

Same: Constitutional law: Assessment of property: Notice: Due process. As the statute expressly authorizes the city council to levy special assessments for public improvements, and provides that the assessed valuation of the property shall only be *prima facie* evidence of its value, the council in apportioning the benefits may determine the value of the property without notice to the owner; and as the statute provides for notice to the owner of the proceedings leading up to the assessment its valuation without notice does not work a deprivation of property without due process. *Idem.*

Street grade: Establishment: Damages. The only method of establishing the grades of city streets is by an ordinance for that purpose, it cannot be done by the mere act of the city officials in lowering or raising the grade; and until a grade has been established by ordinance the city is liable to adjacent property owners for injury resulting from a change of the surface of the street. *Brown v. City of Sigourney, 184.*

Street improvement: Assessment of county property. Both the area rule and the front foot rule may be considered in assessing the benefits to a county from paving streets around its court house square, but neither rule is conclusive; as the ultimate question is one of benefits to all of the property adjacent to the streets improved and numerous matters enter into an equitable apportionment. *Madison County v. City of Winterset, 223.*

Same: Interest. The allowance of interest on an assessment for a public improvement after its maturity, the same as on ordinary taxes, is proper. *Idem.*

Sidewalk accident: Negligence: Instructions: Prejudice. The instruction in an action for a sidewalk injury that plaintiff must recover, if at all, on the ground of the negligence alleged in the original notice, which stated that defendant had permitted the walk to be in a defective condition, in that it was broken, uneven and covered with ice and snow; and that the allegation in the petition that the city had permitted the walk to be improperly constructed, with the surface broken so that it was slippery from melting snow and ice, or from want of proper drainage, constituted a cause of action not to be considered because not commenced within the proper time, was not prejudicial to defendant although plaintiff might have properly complained thereof. *Finnane v. City of Perry, 171.*

Negligence of city: Evidence. In this action for injuries caused by stepping upon an alleged broken and uneven sidewalk, covered

MUNICIPAL CORPORATIONS Continued to

NEGLECT

with ice and snow, the evidence is reviewed and held sufficient to require submission of defendant's negligence and to support a verdict for plaintiff. *Idem.*

Same. Evidence that ice accumulated on all walks of the city from melting snow during the season in question, even if the walks were well drained, and that it was impossible with ordinary diligence and usual methods to keep any sidewalk free from ice was properly excluded, although it might have been admissible had it been offered with respect to the particular walk in question. *Idem.*

Same: Removal of snow and ice: Duty of city: Instructions. A city is not required to remove all snow and ice from its walks, but must use ordinary and reasonable care to remove defects arising out of conditions occurring after snow has fallen. The instructions regarding the duty of the city to keep its walks in a reasonably safe condition when construed as a whole present the true rule and were not prejudicial in character, nor objectionable as shifting the burden to defendant to show that the walk in question was in a safe condition for use. *Idem.*

Ordinances: Subject: Title. An ordinance regulating vehicles when upon the streets, whether in use or left standing, and also providing how they shall be driven and where they shall be placed when standing, and another section dealing with street obstructions, is not objectionable as embracing more than one subject; and the subject treated is sufficiently expressed by the title, "An ordinance governing and regulating traffic on the streets." *Withey v. The Fowler Co.*, 377.

Ordinances: Construction of term "alley." A private alley connecting with the street and used for driving to and from the street, is an alley connected with the street, within the meaning of an ordinance defining the manner in which vehicles shall pass from the street into an intersecting alley. *Idem.*

MURDER. See CRIMINAL LAW.

NEGLECT. See RAILROADS—TELEGRAPHS AND TELEPHONES—MINES AND MINING—MUNICIPAL CORPORATIONS.

Automobile accident: Contributory negligence. The fact that plaintiff, as she saw the truck approaching the automobile in which she was riding, realized the danger of a collision and put out her hand and motioned the driver of the truck to stop, when the tongue of the truck struck her hand accidentally, or that she put out her

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hand because of her instinctive movement to ward off the collision, did not render her guilty of negligence as a matter of law. *Withey v. The Fowler Co.*, 377.

Same: Imputed negligence. The negligence of the driver of an automobile cannot be imputed to one riding with him simply as an invited guest, in no manner responsible for the course of the machine and assuming no control over the driver. To charge one occupying a car with the negligence of the driver there must be some other relation between them than that of mere host and guest; and the mere fact that both have engaged in a drive for mutual pleasure does not materially alter the situation. *Idem.*

Evidence of general custom. Where plaintiff alleged in an action for injuries caused by an explosion of gasoline which escaped from defendant's pumping engine, that it was the custom for shippers of stock to start the engine and to go into the pit to prime the pump with water, evidence that shippers other than plaintiff had been in the habit of starting the engine and thus priming the pump, was admissible for the purpose of showing an invitation and general custom of so doing. *Snipps v. Minneapolis & St. Louis R. R. Co.*, 530.

Same: Evidence. Evidence that the foreman of defendant's water supply had been instructed to permit no one except employees of the defendant to enter the pump house was properly rejected, where it appeared that shippers of stock were generally allowed to pump water for their stock, and it did not appear that plaintiff knew of the order. *Idem.*

Injury to invitee. Where the evidence tended to show an invitation to shippers of stock to enter the pump house and operate defendant's engine and pump for the purpose of watering their stock in defendant's yards, the defendant was required to use reasonable care to maintain its pump and engine in a reasonably safe condition for use. *Idem.*

Proximate cause: Evidence. Where the evidence tended to show that it was the custom of shippers to use defendant's pump for watering stock, and in doing so it was necessary to go into a pit to prime the pump, using a light, and an explosion of gas occurred as the result of a leakage of gasoline from the engine above, resulting in injury to plaintiff, which conditions were known or in the exercise of reasonable care should have been known to defendant in time to have remedied the same, the dangerous condition of the engine and pump was the proximate cause of the injury. *Evi-*
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dence held to require submission of the issue of proximate cause to the jury. *Idem.*

Repair of defects: Instruction. An instruction in this case that if defendant had notice, either actual or constructive, of the defects complained of and failed to repair the same it would be chargeable with negligence, was fundamentally erroneous in failing to state that such notice must have been for such length of time that defendant, in the exercise of reasonable care, might have repaired the defects before the injury occurred. Independent of any request or failure to request an instruction upon that point it was the duty of the court to give it. *Idem.*

Instructions: Assumption of facts. The instruction in this case, which assumed the right of defendant to be at the place where he was injured, a fact which was in dispute, was erroneous for that reason. *Idem.*

Infants: Wrongful death: Recovery of burial expenses. Under the statute of this state a father and, in case of his death, imprisonment or desertion of his family, the mother can recover for expenses and actual loss of services resulting from the injury or death of a minor child; and included in the term expenses are those of suitable burial. *Carnego v. Crescent Coal Co.*, 552.

Burial expense: Reasonable value: Evidence. While proof of the cost of an article on the open market or at auction is some evidence of the reasonable value of the article, evidence simply that plaintiff paid a specified sum for the burial expenses of his minor child negligently killed, though admissible to show that such expense had been incurred, was insufficient to show the reasonable value of the same and to justify submission of that issue to the jury. *Idem.*

Infants: Negligent death: Damages. A parent is entitled to recover for the negligent death of a minor child the present worth of his probable earnings to the time of his majority, less the probable cost of his support and maintenance for such time.

In the instant case the net earnings of a minor son for about two years and five months, including a reasonable sum for burial expenses is not shown to have exceeded \$1,000.00. *Idem.*

Master and servant: Existence of relation: Liability of Master. To create a liability by an employer for injury to a servant, the relation of master and servant must have existed at the time of the injury, and the injury must have been received in connection

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with some service being rendered while in the performance of duty, and as the result of a failure of some duty on the part of the master, or of those for whose acts he was responsible.

Where plaintiff's decedent had brought his train to the end of his run, and he had registered and was on his way home, riding the engine of another train for his own personal convenience, the relation of master and servant did not exist and the master was not liable for his injury in such circumstances. *Dodge v. Railway*, 627.

Master and servant: Personal injury: Evidence. In this action for injury to a workman while brushing the shavings away from the knives of a planer with which he was at work, evidence that in putting a long timber through the machine it was necessary that it go over the knives at an angle, was admissible as tending to show that more shavings were thus made and that this fact required cleaning the same away. *Murray v. Daley*, 612.

Use of dangerous machinery: Guards: Evidence. It is competent to show by citing particular instances that there are guards in use for the protection of workmen about a machine, required by the factory act to be provided with guards, which will not materially interfere with its efficiency. *Idem*.

Use of proper guards: Statutes. The factory act does not require an employer to use the latest and most improved machinery, or any particular kind, provided he uses such care in the selection of the same as a reasonably prudent man would exercise; but the act does require him to use the most efficient and best known guards for protecting workmen from the dangers incident to the operation of the machinery, and he must know what constitute proper guards, install and keep the same in repair, although he is not required to buy every kind of guard that may be on the market. *Idem*.

Unguarded machinery: Burden of proof: Instruction. Where an injury occurs from the use of a machine unguarded as required by the statute, as a rule it is incumbent on the employer to show that there was no guard which was practical that would have prevented the injury; but where the servant assumed the burden of showing that the machine was not guarded as required by the statute and offered evidence in support thereof, an instruction practically withdrawing the evidence and advising the jury that defendant was not bound to install the latest and most improved guards or appliances, and that his duty was performed if he fur-

NEGLIGENCE Continued

nished such guards and appliances as were reasonably safe and proper, was, under the circumstances prejudicial error. *Idem.*

Instruction. In an action for a personal injury resulting from the unguarded condition of a machine required by the statute to be provided with proper guards for the protection of workmen, the court should advise the jury what sort of a contrivance would in law be considered a proper guard, or at least define the requirements of the statute so that the jury would be able to say whether the machine was properly guarded. The instruction in the instant case was insufficient in this respect. *Idem.*

Negligence of vice principal. Where an experienced man in charge of the planing machine by which plaintiff was injured while removing shavings, operated the machine and removed the shavings in the presence of plaintiff without using the guards provided, and there was evidence that he never used the guard because he deemed it a nuisance, he stood as the representative of the master whose duty it was under the statute to provide a suitable guard, and the master could not say that the negligent act of his representative was that of a co-employee. *Idem.*

Assumption of risk: Instruction. Where the plaintiff alleged that the machine by which he was injured was dangerous within the meaning of the factory act, the court should have instructed substantially in the language of the statute that plaintiff should not be deemed to have assumed the risk of defects in the machine, known to both himself and the master, by continuing in the work, unless in the ordinary course of his employment it was his duty to remedy the defects. *Idem.*

Warning. Where an employee is given more hazardous work than that for which he was employed and accustomed to, it becomes the duty of the master to warn him of the dangers incident to the new employment, failure to do which is negligence. *Idem.*

Relation of master and servant: Scope of employment. Where plaintiff was set to work about a planing machine with an experienced fellow servant in charge, and with mere general directions as to what to do, and as occasion required the employee in charge removed the shavings in plaintiff's presence without using the guard, plaintiff's attempt to remove them in the same manner was an act within the scope of his employment. *Idem.*

Contributory negligence. An inexperienced employee set to work with a machine in company with a fellow servant in charge of the

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NEGOTIABLE INSTRUMENTS

same, and having no knowledge of his danger and without warning, is justified in believing it to be safe; and his conduct in following the example of the more experienced servant in operating the machine will not render him guilty of negligence as a matter of law. *Idem*.

Contributory negligence: Statute. Under the provisions of the factory act the doctrine of assumption of risk is not a defense, unless it amounts to contributory negligence; and a stronger showing is required to establish contributory negligence under the statute than at common law. *Idem*.

Personal injury: Married women: Damages: Loss of earning capacity. Marriage does not deprive a woman of her right to pursue an independent occupation, and she may recover for injuries depriving her of her earning power in such occupation; and the fact that she may not be engaged in such pursuit at the time of the injury, or may have abandoned the same, will only affect the amount of her recovery. *Withey v. The Fowler Co.*, 377.

NEGOTIABLE INSTRUMENTS.

Consideration: Parol evidence: Variance of writing. Where a note and written contract were executed as parts of the same transaction, the contract purporting to be the consideration for the note, which was plain and unambiguous and unimpeached for fraud or mutual mistake, evidence in a suit upon the note by an assignee that the consideration was other than that recited in the contract, or that it had failed, was inadmissible; as the assignee was not a stranger to the transaction in a legal sense so as to render oral evidence in contradiction or explanation of the writing admissible. *Blumer v. Schmidt*, 682.

Consideration: Evidence. Where defendant pleaded the affirmative defense that there was no consideration for the note in suit, or that the consideration had failed, plaintiff was entitled under his denial by operation of law to offer in evidence a written contract, made as part of the same transaction as the note and purporting to be the consideration therefor. *Idem*.

Intoxication as a defense: Submission of issue. Where defendant pleaded in defense to a suit on his note that he did not intend to execute the same, that it was procured by fraud and at a time when he was under the influence of liquor, evidence that he had been drinking heavily on the day the note was executed was sufficient to take the issue tendered by the answer to the jury. *Gittings v. Duncan*, 373.

Oral contracts: Statute of frauds: Evidence. In this action upon an oral agreement to sign certain promissory notes the evidence

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NEW TRIAL

tended to show that the defendant sought to be held liable was not to become a surety for his co-defendant, but was seeking to promote his own interests, thus taking the oral promise out of the statute of frauds; and a denial of this evidence by plaintiff presented a conflict upon the question of whether the promise was independent or collateral, which was for the jury to determine. *Wachal v. Davis*, 360.

- **Suretyship: Evidence.** Where a note does not disclose the fact that the liability of one of the signers was that of surety that question must be determined by other evidence, either as between the principal and sureties or as between the sureties themselves. In the instant case the evidence is held to show that the liability of one signer was secondary to that of the other. *Hoyt v. Griggs*, 672.

Co-sureties: Agreements as to liability. It is competent for the signers of a negotiable instrument to agree between themselves that one shall be primarily liable and the other liable secondarily. *Idem*.

Assignment: Presumption as to title. Where the only controversy in a suit upon a promissory note by the assignee arose between the sureties over their relative liability, and the note was introduced by plaintiff without objection or question as to his right to recover, and the principal debtor made no defense, the circumstances were presumptively sufficient to show the assignment. *Idem*.

NEW TRIAL.

Grounds: Withdrawal of cause of action. Plaintiff sued in two counts, each based on delay in delivery of a telegram. At the close of the evidence the court withdrew the second count from the consideration of the jury and submitted the case upon the first count and a verdict for defendant was returned. *Held*, that the ruling withdrawing the second count was not a final adjudication from which plaintiff was required to appeal to preserve the right to urge error therein, but that it was a matter which could be urged as a ground for new trial, and a granting of new trial on that ground left no order from which plaintiff could appeal. *Matthews v. Telegraph Co.*, 329.

Misconduct of counsel. The remark of counsel, in objecting to a question as leading, "Why can't he ask him what he did? There is only one reason and that is he wants to tell the witness as near as he can," was not prejudicial misconduct. *Withey v. The Fowler Co.*, 377.

NEW TRIAL Continued TO PARENT AND CHILD

Remarks of court: Review. There was no impropriety in the court's remark to counsel, in ruling upon objections to evidence, that prior or contemporaneous agreements were not admissible to vary the writing sued upon, and if the writing did not express the agreement of the parties it could be reformed by a proper proceeding, but not in a law action. Besides no exception was taken to the remarks and the alleged error was not therefore reviewable. *Kinney v. Reed*, 337.

Review of motion. Where the trial court makes no finding of facts upon the affidavits and counter affidavits, in support and resistance of a motion for new trial, the appellate court will not consider the same. *Spaulding v. Laybourn*, 277.

Misconduct in argument. A statement of counsel in argument to the jury that plaintiff was attempting to back out of an alleged oral contract as the evidence showed he had done in other instances, was not such misconduct as to justify the appellate court in interfering with the discretion of the trial court in ruling upon the question. *Spaulding v. Laybourn*, 277.

NUISANCE. See INTOXICATING LIQUORS.

PAYMENT.

Application. The rule that the debtor has the right to control the application of payments where several obligations exist is only applicable where the payments are voluntary. Where the credits arise out of certain security the creditor is entitled to them as a matter of right and may apply them in the order of the liens. *Kinhead v. Peet*, 65.

Payment by mistake: Recovery: Laches. Where plaintiff brought his action to recover money paid through oversight or mistake, within a reasonable time after discovery of the mistake, he was not barred of relief on the ground of laches. *Conn v. Converse*, 604.

Same: Mutuality of mistake: Evidence. To recover money paid by mutual mistake it must appear by clear and satisfactory evidence that the mistake was mutual, as distinguished from an unilateral error. *Idem*.

PARENT AND CHILD.

Parentage: Evidence: General reputation. Parol evidence that among the friends and acquaintances of the family, the plaintiff, born out

PARENT AND CHILD Continued **TO** **PLEADINGS**
of wedlock, was generally reputed to be the son of defendant is admissible on the question of parentage, but not sufficient when standing alone to establish the ultimate fact of parentage. *Hays v. Claypool*, 297.

Parentage: Recognition: Evidence. To establish a parent's recognition of an illegitimate child it must appear that he openly acknowledged his parentage in conversation with friends and associates, whenever there was occasion to refer to the subject, although the recognition need not have been so universal as to be known to all. The evidence in the instant case is insufficient to show recognition. *Idem*.

PARTIES. See **EMINENT DOMAIN**.

PARTITION.

Prior settlement: Evidence. In this action to partition estate lands the evidence is reviewed and held insufficient to show that a family settlement either related to or affected the title to the real property. *Sagen v. Gudmanson*, 440.

PARTNERSHIP.

Accounting: Evidence: Books of original entry. Although the items of account kept by plaintiff, claiming a partnership with defendant, were not all in chronological order, but were explained as having been entered when ascertained as of the date when and where made, the books were admissible under the statute as books of original entry in an action for an accounting. Evidence held sufficient to show a partnership. *Trainer v. Robyn*, 508.

PERPETUITIES. See **GIFTS**.

PERSONAL SERVICES. See **CONTRACTS**.

PLEADINGS. See **REAL PROPERTY**.

Amendment: Motion to strike. Where plaintiff in a substituted petition repleaded the same matters contained in the original petition, and in addition thereto the necessary averments to comply with the ruling upon a demurrer to the original pleading, a motion to strike the substituted petition on the ground that it alleged the same matters was properly overruled. *Kinney v. Reed*, 337.

PRACTICE

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RAILROADS

PRACTICE.

Special interrogatories. Where plaintiff's right of recovery depends upon the existence of many facts, each having relation to the other and constituting the facts upon which the final conclusion rests, refusal to submit special interrogatories as to whether plaintiff had established the truth of every matter alleged was proper. *Allgood v. Fahrney*, 540.

Transfer to equity: Prejudice. Where the defendant was in a better position to appeal from a judgment in a law action than he would have been to appeal from a decree in equity, any error in refusing to transfer the cause to the equity side of the docket for the purpose of permitting him to bring in other parties was harmless. *Blumer v. Schmidt*, 682.

PUBLIC OFFICERS. See LIMITATION OF ACTIONS.

QUIETING TITLE. See JUDGMENTS—REAL PROPERTY.

RAILROADS. See CARRIERS.

Crossing accident: Appeal: Findings of fact: Conclusiveness. Where the only complaint of a railway company, on appeal from a judgment against it for a crossing accident, was that the record affirmatively showed contributory negligence of plaintiff, the finding of defendant's negligence in failing to give the statutory crossing signals as alleged and submitted will be accepted as a proven fact, when considering the issue of contributory negligence. *Davitt v. Railway*, 216.

Same: Contributory negligence: Evidence. One about to cross a railway track is not bound as a matter of law to look and listen for an approaching train at any given point; and whether he looked and listened at a point where he might have seen the train, and by the exercise of ordinary care avoided the accident is generally a question of fact. Evidence held to show that the driver of the team in the instant case might have discovered the approaching train before it was too late, had he been constantly on the lookout. *Idem*.

Same: Signals: Contributory negligence: Evidence. One approaching a railway crossing may expect the giving of statutory train signals; and if he listened but heard no signal the question of whether he exercised due care at the time was for the jury. His right, however, to expect the giving of signals will not excuse his exercise of ordinary care for his own safety at all times when

RAILROADS Continued

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REAL PROPERTY

approaching the crossing. In the instant case the question of whether plaintiff's ward, who was driving the team for him, was guilty of negligence was for the jury. *Idem*.

Liability for employee's death: Federal safety appliance act: Application. Plaintiff's decedent, a freight conductor, picked up a car enroute which was in bad order, attaching it to the rear of his train. He also fastened to the car a chain which had been used for attaching it to another car, as a convenient method of carrying the same with his train. Upon reaching the end of his run decedent left his train, registered and for the purpose of riding to his home boarded the engine of another train going out on the same track over which his train had come in. The engine on which he was riding was derailed by a portion of the chain which had been attached to the car brought in by him, resulting in his injury and death. *Held*, that as decedent had finished his run and was not then engaged in interstate commerce, and as the bad order car did not contribute to the accident the Federal Safety Appliance Act had no application, and that defendant was not liable thereunder for his death. *Dodge v. Chicago, Great Western Ry. Co.*, 627.

Carrier and passenger: Relation: Evidence. One may be a passenger though riding upon a freight train, if the train is used for that purpose; but the relation of carrier and passenger as between a railway company and an employee rests upon contract, either inherent in the contract of employment or by an independent agreement for his transportation. The mere existence of a custom of employees to ride from the yards of the company to their homes at the close of work will not alone establish the relation. *Idem*.

Same: Injury to licensee: Required care. Where an employee of a railway company has permission as a licensee to ride upon a train when not engaged in his employment, he exercises the privilege at his own risk of injury from obvious dangers, and the company owes him no duty except the exercise of ordinary care to prevent injuring him upon discovering his peril. *Idem*.

REAL PROPERTY. See TENANCY.

Abstract: Merchantable title. A contract to furnish a "merchantable abstract of record," requires that it shall epitomize the record, simply, but must be one which is acceptable in the ordinary course of business to a reasonably prudent purchaser or mortgagee, when advised of the facts and of the law involved. *Billick v. Davenport*, 105.

REAL PROPERTY Continued

Same: Merchantable abstract: Defects. An abstract of title disclosing that land in a foreign state was purchased of the state by plaintiff's remote grantor, one "Price," the patent reciting "to have and to hold the same * * * unto said R. R. Rice and to his heirs and assigns forever," did not disclose a "merchantable title of record," and an affidavit that the land was in fact patented to Rice and that the mistake was that of the recorder did not cure the defect, there being no statutory provision of the state authorizing the correction of such discrepancies by affidavit, or for recording the same. *Idem.*

Same. Under a contract to convey land subject to a stipulated amount of mortgage indebtedness, an abstract showing a greater amount of unsatisfied mortgages, though in fact a portion of the indebtedness was paid, was defective in failing to show the actual extent of the incumbrance; in the absence of some satisfactory extraneous evidence showing payment or a deposit of money to cover any possible difference. *Idem.*

Action by state to quiet title: Estoppel. Where the waters of a slough or bayou receded and it ceased to be a running stream, and as a result of overflow water soil was gradually deposited therein until it became suitable for cultivation, and was so used by the riparian owners for at least ten years, their rights therein were of such character as to justify a denial of relief in an action by the state to quiet title to the slough, on the ground of laches and estoppel. *State of Iowa v. Livingston*, 31.

Boundaries: City lots: Width: Evidence. In this action involving a disputed boundary lot line the evidence is held sufficient to show that the lots were sixty feet in width as surveyed and platted. *Kamrar v. Butler*, 293.

Boundaries: Location: Evidence. In this action to determine a disputed boundary line the evidence is reviewed and held to show that a highway, as actually located, was on a line designated by the measurements and monuments made by the original surveyor, and was not on a midsection line between the lands of plaintiff and defendant, as called for by the field notes. *Brause v. Fayette County*, 606.

Same. Where a highway was located and established according to the actual stakes and monuments as fixed by the original survey, that location will govern where a dispute arises from a conflict between such monuments and the field notes. *Idem.*

REAL PROPERTY Continued

Contract of sale: Performance: Quieting title: Evidence. Defendant purchased a tract of land upon the representations of plaintiff and his agent, and under the mistaken belief, that it contained certain land with timber thereon. It was subsequently agreed in settlement of the dispute that plaintiff should convey the strip in controversy, provided defendant found a purchaser for the balance of the tract. This defendant did but plaintiff refused to perform unless a mistake in the price was rectified. Defendant then tendered the balance of the purchase price according to the contract, which was refused. *Held*, to warrant a finding that plaintiff agreed to convey the disputed tract to defendant, in consideration for the settlement and the finding of a purchaser for the remainder of the tract, and to show sufficient performance by defendant to warrant a decree quieting the title to the tract in dispute. *Lyon v. Bradfield*, 368.

Contract for exchange of property: Tender: Sufficiency. Where one of the parties to a contract for the exchange of lands, who was obligated to pay a cash difference, offered to pay and had more than the amount available, which would have been produced had not its production been waived, the tender was sufficient. *Billick v. Davenport*, 105.

Easements: Termination by transfer of servient estate: Fraud: Evidence. Where the owner of premises granted a right of way over the same to an adjoining owner for such time as he should remain the owner, a conveyance to his wife of the bare legal title for the sole purpose of depriving the adjoining owner of the right of way would not terminate the easement; but in the instant case the evidence disclosed that the conveyance was made for a sufficient consideration and prior to any controversy or threatened litigation and no fraudulent purpose was shown, except that the conveyance was in the nature of a gift and made shortly before commencement of suit to restrain obstruction of the way. *Held*, insufficient to support the action. *Arbaugh v. Alexander*, 635.

Same: Right to terminate: Fraudulent conveyances. One having granted a right of way over his land for such length of time as he shall continue to own the same does not thereby lose the right to sell or give the land away, even for the purpose of terminating the easement; as neither a creditor nor the holder of a lien upon the land could object that a conveyance by the owner was voluntary. *Idem*.

Fixtures: Machinery. Where machinery is sold with the understanding that it will be attached to and become a part of the realty

REAL PROPERTY Continued

so that it cannot be removed without injury to the property, the vendor thus places it within the power of the vendee to sell or mortgage the same to an innocent purchaser, and must suffer the loss if any occurs thereby. *Allis-Chalmers Co. v. City of Atlantic*, 8.

Same: Conditional sales: Bona fide purchaser: Notice. Where machinery is sold, the vendor knowing it is to be attached to the real property of a third person and used for a particular purpose, it is necessary, to charge such third party with notice of a conditional sale reserving title in the vendor until the full purchase price is paid, that he have actual notice of the reserved title; constructive notice effected by recording the contract is not sufficient under such circumstances. *Idem.*

Conversion: Estoppel: Elements of defense: Instruction. Where the vendor of machinery sold the same to a city contractor, with knowledge that it was to be permanently installed in the electric light plant of the city and used in connection therewith in such manner as to make it a part of the realty, and the city subsequently purchased the same of the contractor without notice of a provision in the original contract of sale by which the title was reserved to the seller until payment of the purchase price, it was not necessary for the city to show, in addition to the above facts, that it had paid the contractor for the same, as an essential element of its defense of estoppel in a suit by the seller against it for conversion. *Idem.*

Instructions. Where it appeared from the evidence as in this case that the fixtures were purchased by the contractor and placed in the city light plant at different times, and the issue as to the time the city received notice of the condition under which they were purchased by the contractor was also raised by the evidence, the court in submitting the question of plaintiff's right to assert its claim against the city should have distinguished between the fixtures placed in the plant before the alleged notice and those so placed thereafter. *Idem.*

Measure of damages: Instructions. Where an action for the conversion of fixtures was tried on the theory that the original cost was competent evidence of the value of the same, failure to definitely instruct on the question of the reasonable value of the fixtures was not erroneous, in the absence of a request therefor. *Idem.*

Evidence. Refusal to permit the mayor of defendant city to state in this case whether he would not have consented to placing the fixtures in the plant had he known of the reserved title in the

REAL PROPERTY Continued

seller, or to permit members of the city council to state whether they would have consented to allowing the contractor for the fixtures had they known of such reserved right, was not reversible error; although the evidence might properly have been admitted as bearing on the question of notice of such reserved title, and in support of the city's plea of estoppel. *Idem*.

Fixtures: Conversion: Right of recovery. Where the title to property has been changed from personalty to realty with the consent of the seller of the personalty his right of recovery is based upon the reasonable value of the property, rather than the right to recover the property itself. *Idem*.

Quieting title: Pleading: Proof: Variance. In actions to quiet title the plaintiff need only allege that defendant claims some adverse interest; so that a petition alleging that defendant claimed under a judgment against one of the heirs to an estate, while the evidence showed that the claim was through another heir, did not constitute a failure of proof. *Hunter v. Amish*, 397.

Quieting title: Disclaimer: Taxation of attorney's fees. The statute providing that a defendant, in an action to quiet title, refusing to execute and deliver a quit claim deed after tender of the expense of the same, cannot avoid the ordinary costs and attorney's fees by filing a disclaimer, does not apply to cases where the defendant in good faith submits his adverse claim for determination by the court. Thus in an action for partition, to which defendants filed a cross bill asking to have their title quieted, they could not upon rendition of judgment in their favor, claim an attorney's fee, although having complied with the statute. *Collier v. Wetmore*, 344.

Same: Discretion of court. The statute authorizing the taxation of attorney's fees upon the filing of a disclaimer in quieting title actions makes the same a matter of discretion with the trial court; and the appellate court will hesitate to interfere with an order refusing the taxation of such fees, in the absence of a showing of an abuse of such discretion. *Idem*.

Specific performance: Conditions precedent: Tender. The burden of proving tender of performance substantially as provided in a contract for the exchange of lands is upon the party seeking specific performance of the contract; and this includes the agreement to furnish a "merchantable abstract of record" at the time of exchanging deeds, independent of any requisitions by the other party; and a failure to do so will defeat specific performance. *Billick v. Davenport*, 105.

REAL PROPERTY Continued

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Trespass: Injunction. An injunction will lie to restrain repeated trespass or threatened injury to real property. *Kamrar v. Butler*, 293.

RECEIVERS.

Compensation: Discretion. The compensation to be allowed a receiver appointed by the court is largely a matter of discretion, and the allowance will not be disturbed on appeal unless an abuse of such discretion is shown. In the instant case an allowance of \$50.00 per month is approved; it appearing that the receiver was to slight actual expense and gave the business but little personal attention. *Herrick v. Davidson*, 462.

RECORDING ACTS. See STATUTES.

REFORMATION OF INSTRUMENTS.

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Breach of warranty: Evidence. Plaintiff sold defendants a gang plow under a warranty that with proper management it would do as good work as any other plow of like size and capacity made for the same purpose. On an issue of breach of the warranty defendants showed the inferior kind and quality of the work done, and the amount of ground a plow of the size of the one in controversy would plow in a day or an hour when in good working order. *Held*, that there was no apparent prejudice in permitting defendants to show that while plaintiffs' agent was present trying to fulfill the warranty defendant plowed an equal amount of ground with a plow of less capacity. *Reeves & Co. v. Younglove*, 151.

Same. It was also competent for defendants to show in support of their claim that the plow would not do good work with the best practical handling; that land owners employed by them refused to allow them to complete their work because of its inferior character; as bearing upon the reasonableness of their contention, and the right to rescind. *Idem*.

Breach of warranty: Duty to return: Waiver. Where defendants, in an attempt to make the plow in question comply with the warranty, changed the mold boards to reduce the friction, and upon their failure to make it work plaintiff's agent also made an unsuccessful attempt to make it work while in its changed condition, the removal of the mold boards, which could easily be replaced and to which no objection was made, was not such an alteration of the

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plow as to relieve the agent's statement that he did not care what was done with the plow, that it belonged to defendants and they would have to pay for it, of its effect as a waiver of the contract provision to return it to the railway station in case it could not be made to work properly. *Idem*.

Liability for purchase price: Evidence. In this action to recover the purchase price of a team of horses the evidence is held to require submission of the question whether defendants bought the team directly from plaintiff, or whether they merely guaranteed payment therefor by another. *Munroe v. Mundy & Scott*, 707.

Same: Evidence. Where plaintiff claimed that defendants were directly responsible to him for the price of a team of horses which he delivered to another, evidence that he knew the other party to be a man who did not meet his obligations was admissible to show why he did not deal directly with such party rather than with defendants. *Idem*.

Evidence: Instruction. Where it was claimed by plaintiff that he sold a team direct to defendants, and by defendants that the sale was to another, they simply guaranteeing payment therefor to the extent to which they should become indebted to such claimed purchaser, an instruction that the only issue in the case was whether defendants were the purchasers was not erroneous as being an undue restriction of the issues; as that was the only fact question in the case, and proof that defendants simply guaranteed payment of the debt would defeat recovery against them. *Idem*.

SPECIFIC PERFORMANCE. See CONVEYANCES—REAL PROPERTY.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS.

SLANDER AND LIBEL. See ACTIONS.

Production of evidence: Materiality. The books of a newspaper office, showing the circulation of the paper in which an alleged libel was published, are material on the question of the extent of the injury sustained, and an order for their production should be granted. *Dalton v. District Court*, 187.

STATUTES. See GIFTS—MINORS.

Constitutionality: Penalty. A valid civil statute, either state or federal, may be enacted without providing therein any penalty or sanction. If the penalty or sanction follows as a matter of course

STATUTES Continued

it need not be written out in the enactment itself. Thus the Webb-Kenyon Act of Congress which is remedial and not penal in character, is not void because containing no penal provision for its enforcement. *State of Iowa v. United States Express Co.*, 112.

Constitutional law: Delegation of congressional power. The Webb-Kenyon Act prohibiting the importation of liquors into a state to be then used in violation of the state law, does not expressly delegate any power to the states to act for congress in the matter of interstate commerce; but is rather prohibitory in character, acting upon articles of commerce and not upon the states, is complete in itself and either permissive in its nature or adoptive of the laws of the state, and is not unconstitutional as a delegation of congressional power. *Idem.*

Constitutional law: Equal protection. The fact that the Webb-Kenyon Act prohibits the shipment of liquors into a state to be used in violation of its laws is not an arbitrary and unjust classification, amounting to a denial of the equal protection of the law; as it is undoubtedly within the power of congress to prohibit some interstate shipments and to permit others. *Idem.*

Constitutional law: Special privileges. The Webb-Kenyon Act is uniform in its operation, and grants no special privileges or immunities to citizens of one state not possessed by others under the same circumstances. *Idem.*

Constitutional law: Due process. There is no absolute right on the part of any one to sell liquor in any state. It is wholly a matter of police regulation; and the Webb-Kenyon Act neither gives nor protects such right. And in prohibiting the shipment into a state to be used in violation of its laws the act deprives no citizen of his property without due process. *Idem.*

Congressional legislation: Re-enactment of state law. After the passage of the Webb-Kenyon law prohibiting the transportation of liquor into a state to be used illegally, thus divesting it of its character as an interstate shipment, it is not necessary for the state to re-enact its laws regulating the sale and transportation of liquor to make them effective. *Idem.*

Recording acts: Application of statutes. The purpose of the recording acts is to provide a means by which the owner of property in the possession of a third person, or a lienholder, may protect himself as against the claims of third persons, on the theory that it cannot be known who might acquire title or rights from the party

STATUTES Continued

TO

SURETYSHIP

in possession; but the reason of the statute does not apply when the rights a third party is to acquire in the property are known to the seller of the personalty at the time of the sale. *Allis-Chalmers Co. v. City of Atlantic*, 8.

STATUTE OF FRAUDS. See NEGOTIABLE INSTRUMENTS.

A promise resting upon a new consideration between the parties, thus giving to the promisor some new advantage, is an original undertaking and is not within the statute of frauds; although the promise is to discharge the debt of another. *Munroe v. Mundy & Scott*, 707.

Oral evidence. Where the purchasers of a team under an oral contract directed its delivery to another, the delivery to such party took the contract out of the statute of frauds; and evidence of the sale was admissible although there was no written memorandum. *Idem*.

STREETS. See MUNICIPAL CORPORATIONS.

SURETYSHIP.

Contract of guaranty: Consideration: Notice of acceptance: Waiver.

Where the stockholders of a corporation executed a written guaranty for the repayment of loans or credits extended by a certain bank to the corporation, the guaranty to be several and to be measured by the amount of their stock in the corporation, respectively, the guaranty of each in proportion to his interest constituted a beneficial consideration to all; and as the contract expressly waived notice of the acceptance thereof, the failure to give a guarantor notice did not avoid liability. *Valley National Bank v. Cownie*, 421.

Renewal of indebtedness: Discharge of Guarantor. Where a stockholder's contract of guaranty for loans and credits not exceeding a certain sum in any one year, including renewals, extensions and new loans, the intention being that it should not only cover repayment of the original loans up to the limit stated, but also all indebtedness for the year, a guarantor was not discharged by the mere giving of renewal notes and an extension of time. *Idem*.

Discharge of guarantor: Renewal of indebtedness: Pleading. The defense by a guarantor that loans were renewed and extended without notice to him must be pleaded to be available. *Idem*.

Discharge of guarantor: Renewal and extension of payment. Where a stockholders' guaranty recited that they were interested in se-

SURETYSHIP Continued

curing credit for the corporation, and they severally guaranteed payment of all loans to the corporation to the extent of the value of their stock, including all renewals and extensions, and they severally waived notice of acceptance of the guaranty and all other notices necessary to be given, either before or after the extension of credit to the corporation, their beneficial interest in the corporation rendered them absolutely liable as principals, and they were not discharged by a failure to give them notice of renewals of the indebtedness and extensions of time of payment. *Idem.*

Extent of liability: Contract: Construction. The law favors sureties and a contract imposing obligations upon them will be strictly construed so as to impose only the burdens within its terms; it will not be extended either by implication or construction. Thus a contract of the stockholders of a corporation to repay a bank all moneys advanced or loaned the corporation on and after that date, including renewals thereof, will not render the sureties liable for pre-existing indebtedness. *Merchants' Nat'l. Bank v. Cressey, 721.*

Same. Under an agreement of sureties to repay money advanced or loaned another after the date of the agreement, a renewal note given for an existing indebtedness was not within the agreement; as it amounted simply to a change in the evidence of an old debt, and was not an advance or loan on and after the date of the contract, and the sureties were not liable therefor. *Idem.*

Contract of guaranty: Fraud: Effect. The fact that a surety was induced by false representations to sign an agreement of guaranty, which was delivered and acted upon by the other party without knowledge of such representations, would not relieve the surety of liability for obligations falling within the terms of guaranty. *Idem.*

Discharge of guarantor: Renewal of indebtedness. Where a contract of guaranty including renewals provided that it should be effective until after thirty days written notice to the contrary was given, by giving the notice a guarantor was not relieved from liability for indebtedness existing at the time of the notice, but only from that subsequently arising; and a creditor accepting a renewal of existing indebtedness after such notice elected to be bound by the notice, and will be presumed to have relied upon the security existing at the time of the renewal. *Idem.*

Burden of proof. In a suit upon a contract of guaranty to repay money advanced or loaned, including renewal after that date, and until notice to the contrary, the burden is upon the creditor to

SURETYSHIP Continued

TO

TENANCY

prove that the indebtedness sued upon was for loans or renewals after execution of the contract. *Idem.*

TELEGRAPHS AND TELEPHONES.

Delay in delivery: Measure of damages. Plaintiff was offered cattle at a certain price if taken by a stated day, and telegraphed his son to buy them in time for the message to have been delivered before expiration of the time for purchase, but the telegram was not delivered until two days later. Immediately upon learning that the telegram was thus delayed he saw the seller who refused to sell except at an advanced price, and he then bought from others at the advanced market price. *Held*, that the measure of damage for failure to deliver the message in time was the difference between the price offered and the price he was required to pay. *Hanson v. Western Union Tel. Co.*, 639.

Same: Evidence. Evidence that when plaintiff saw the seller after his offer to sell the cattle had expired he refused to perform his offer, was admissible on the question of diligence, in reducing his loss; but his testimony that the cattle would have been delivered at the agreed price if his offer had been accepted in time was inadmissible as hearsay, but was without prejudice in view of the fact that the evidence to that effect was undisputed. *Idem.*

Delivery: Negligence: Evidence. Evidence held to require submission of defendant's negligent delay in delivering a death message, addressed to the post office of the sendee and in care of the mail carrier on a certain rural route on which the addressee lived. *Schmidt v. Postal Telegraph Cable Co.*, 654.

Measure of damages. The measure of damages for negligent delay in the delivery of a telegram in this state, forwarded from another state, is governed by the law of the forum and not that of the foreign state. *Idem.*

Negligent delay: Right of action. An action either upon contract or tort can be maintained for negligent delay in the delivery of a telegram. *Idem.*

TENANCY.

Co-tenancy: Adverse possession. The possession of one co-tenant will be presumed to be for the benefit of all, in the absence of a contrary statute; and will be regarded as the possession of all

TENANCY Continued

TO

TRUSTS

until by some act or declaration the interests of the others are repudiated. *Sagen v. Gudmanson*, 440.

Same. To warrant the presumption of disseisin by a co-tenant the adverse holding must be by some act, or series of acts, for such length of time and under such circumstances as will indicate a purpose to occupy the premises to the exclusion and denial of the rights of the other co-tenants, who must have been aware of such intent and have acquiesced therein. *Idem.*

Same. Entry and possession by one co-tenant inures to the benefit of the others, not only as between themselves but as to strangers also. In the instant case the evidence is held insufficient to show adverse possession by one co-tenant. *Idem.*

Same: Improvements: Estoppel. The making of improvements by a co-tenant in possession without advising with the other tenants is not necessarily inconsistent with occupancy as a co-tenant; and failure of the other tenants to make objection to the improvements will not as a matter of law estop them from asserting that they were not made under an adverse claim. *Idem.*

Same: Laches. Co-tenants may rely on the good faith of the one in possession, and that his acts are not hostile to their interests; and they will not be guilty of laches in so doing, which will bar their rights in the property, unless the delay equals the period of limitations. *Idem.*

Same: Improvements: Compensation. It is only in exceptional cases that a co-tenant may voluntarily burden the property with improvements to the expense of the other tenants; and especially when the rents and profits were ample to meet such expenses. *Idem.*

Same: Rents and profits: Accounting. A co-tenant in possession, not having leased the premises or distinctly asserted ownership of the entire estate, cannot be required to account for rents and profits, but after ouster must account therefor. *Idem.*

TRANSFER OF CAUSES. See ACTIONS.

TRESPASS. See REAL PROPERTY.

TRUSTS.

Charitable trusts. Where the charitable character of a trust has been made apparent all doubts will be resolved in its favor. *Wilson v. First Nat'l Bank of Independence*, 402.

TRUSTS Continued

Same: Validity. A charitable trust will not be held invalid simply because it cannot take effect as fully as the donor intended; but it will be given effect by the court as far as possible. Nor will it be held void because contemplating gifts from others which may never be made; and in the absence of any evidence as to the necessities of the case a gift of \$30,000 for the purpose of founding a training school and public library will not be held so inadequate as to invalidate the bequest for that purpose. *Idem.*

Same: Necessity therefor. A bequest for the establishment of a training school will not be held invalid on the ground that the necessity for such charity has been removed by provision therefor in the public schools. It is not open either to the parties or the court to enter upon such an inquiry. *Idem.*

Power to create: Character of instrument. The legal title to any property may be conveyed to a trustee to be held for the benefit of others; but where enjoyment is deferred until after the death of the grantor the legal title remains in him until his death and the instrument is to be treated as testamentary in character. Where, however, the conveyance transfers the title, dominion and control of the property to the trustee at the time of its execution, a postponement of the enjoyment to some future time will not make the instrument testamentary in character. *Haulman v. Haulman*, 471.

Power of disposition: Rights of beneficiary: Revocation of trust. Any competent person has a legal right to transfer any kind of property to a trustee for the use of a designated beneficiary, with or without consideration, and the beneficiary acquires an immediate and vested interest subject only to the rights of creditors; and such a disposition when consummated is binding upon the donor and all persons claiming under him, and cannot be revoked unless the power of revocation has been expressly reserved. *Idem.*

Same: Wills: Gifts: Distinction. The donor placed certain money in trust for his children with provision that other sums might be added to the fund, and provided that he should receive interest on the fund, if he so desired, with final distribution five years after his death. The donor gave directions as to the management of the fund but reserved no control over the same. It was also provided that each child might receive a loan from the fund or in case of necessity might have his share of the fund. The issue of deceased children were to have the share of their parents, and the survivors the share of any child dying without issue. *Held*, that the instrument conveyed a present interest and was not testamentary in

TRUSTS Continued

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character, so that the wife of the donor who was married to him after the execution of the trust was not entitled to anything out of the fund. It is also held that the instrument did not create a gift *inter vivos*. *Idem*.

VACATION OF JUDGMENTS. See MARRIAGE AND DIVORCE.

WARRANTIES. See SALES.

WATERS.

Title to bed of non-navigable stream. A government section was surveyed as fractional and divided into lots and included also a meandered tract designated as a lake, but which in fact was a slough that in times of high water was overflowed but ordinarily contained little water. Gradually it was filled with sediment deposited by the overflow so that it was tillable except in time of high water. The section was granted to the state as swamp and overflowed land, but the patent described simply the lots, omitting the slough. Subsequently the state conveyed the entire section to the county. *Held*, that the county thus acquired the title to the entire section and that the state had no such interest by reason of its sovereignty that it could prevent the owners of the several lots from exercising a proprietary interest over the bed of the slough. *State of Iowa v. Livingston*, 31.

Meander lines: Riparian rights: Accretions. While the meandering of a stream by the government survey is conclusive as to the navigability of the stream so far as the rights of riparian owners are concerned, still the meander line is not in a strict and conclusive sense a boundary line; as the riparian owner has rights in the accretions beyond that line. *Idem*.

Same. The owner of land adjoining a navigable stream has a right of accretion, while in case of a non-navigable stream the adjoining proprietor owns to the center of the stream and is entitled to all that may be added to the land by accretion or otherwise within that limit. *Idem*.

WILLS.

Testamentary capacity. One who possesses a mind capable of exercising judgment, reason and deliberation, and of weighing the consequences of his act to a reasonable degree, and the effect of his act upon his estate and family, is competent to make a will; it is not necessary that he should have sufficient capacity to do business generally or to engage in difficult and intricate matters. *Bales v. Bales*, 257.

WILLS Continued

Same: Evidence. In determining testamentary capacity it is proper to inquire into the relationship of the parties, and ascertain whether the testator has been indifferent or forgetful of those who are fairly entitled to the recognition of a reasonable and rational mind, in making a disposition of his property. The evidence in this case shows a recognition by the testator of those claims upon his bounty which a man of ordinary intelligence and judgment would naturally recognize. *Idem.*

Same: Opinion evidence. Before a witness is entitled to give his opinion as to the ultimate fact of testamentary capacity he must detail the facts within his knowledge upon which the opinion is based; and even then his opinion is not conclusive. In the absence of a showing of peculiar acts and conduct indicating unsoundness of mind his opinion is entitled to no weight. The evidence of unsoundness of mind in the instant case was based upon physical weakness, but in all business transactions the witness freely admitted that testator seemed rational and capable of transacting the business in hand. *Idem.*

Direction of verdict: Will contest: Evidence. It is not the duty of the court to submit a cause to the jury because there is some evidence introduced by the party having the burden of proof, unless of such a character as to warrant a verdict in favor of the party offering it which will stand; and a motion to direct a verdict should be sustained when from a consideration of all the evidence it clearly appears that a verdict for the party having the burden would have to be set aside if returned in his favor; but the party against whom the ruling is made is entitled to have all the evidence in his favor considered in its most favorable light. The evidence is held insufficient when thus construed to support a verdict for contestants. *Idem.*

Testamentary capacity: Presumption: Burden of proof. Where a will has been formally executed and attested as required by law, the presumption arises that the testator had sufficient mental capacity, and the burden is upon the contestants to establish his want of capacity. *Philpott v. Jones*, 730.

Trial de novo. A will contest is not triable *de novo* on appeal, but the verdict of the jury when supported by evidence sustaining their finding is conclusive. *Idem.*

WILLS Continued

Testamentary capacity: Evidence. Mere age, feebleness or failing memory of testator, or exclusion from his bounty of some or all of his legal heirs, or inability to make contracts or engage in intricate business matters, will not be sufficient to defeat a will on the ground of mental incapacity, if the testator retains sufficient mentality to comprehend the objects of his bounty, the nature and extent of his estate and the disposition he wishes to make of it. However, incapacity to make a will may exist though to outward appearances a testator may seem to non-experts with whom he may come in casual contact to be competent. Evidence held to sustain a finding of incapacity. *Idem.*

Evidence: Pecuniary condition of contestant. The contestant of a will may show his pecuniary condition, where it appears that such condition was known to the testator at the time of making the will. *Idem.*

Mental capacity: Opinion evidence: Form of answer. The answer to a hypothetical question touching the mental capacity of a testator, that he was not a normal individual, was not competent to transact business, and that personally the witness would not take the conclusion or judgment of such an individual as being sound, while not expressed with technical nicety, sufficiently expressed the opinion that testator was not of sound and disposing mind. *Idem.*

Instructions: Invasion of province of jury. A requested instruction selecting a portion of the evidence and seeking to give it undue prominence followed by an attempt to minimize its probative force on the theory that standing alone it would not establish the fact sought to be proven, was properly refused. Thus in the contest of a will it would be improper for the court to take up such questions as the unreasonableness of the disposition of the property, the exclusion of legal heirs or members of the family entitled to testator's bounty, or that those entitled to his bounty were in poor financial circumstances, and treat each matter in its probative force as standing alone, although such matters are entitled to consideration along with the other evidence in determining the testator's mental capacity. *Idem.*

Same. There is no legal presumption that a physician who attended testator and treated his physical infirmities is presumed to know his mental condition better than one trained in the treatment of mental diseases; and the requested instruction in this case calling particular attention to the evidence of the attending physician, and suggesting the thought that he was thus better qualified to

WILLS Continued

 speak on the subject, without referring to his qualification or experience was properly refused. *Idem.*

Instructions: Conformity to evidence. Where it clearly appeared that testator knew the financial condition of the contestants of his will before the will was made, an instruction that the financial condition of contestants might be taken into consideration, without confining its consideration to such condition as was known to testator, was not erroneous. *Idem.*

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